

R E P O R T S
O F
C A S E S

ADJUDGED IN THE

Court of King's Bench :

TOGETHER WITH

Several Special C A S E S adjudged in the Courts of
Chancery, Common Pleas, and Exchequer,

From the Revolution to the Tenth Year of Q. A N N E.

By WILLIAM SALKELD,
late Serjeant at Law.

With Two TABLES; one of the NAMES
of the CASES, the other of the PRINCIPAL
MATTERS therein contained.

V O L. III.

Printed from the Original Manuscript, written by himself.

A NEW EDITION, with many additional REFERENCES.

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MDCCLXXIII.

REPORTS

CASES

OF THE

COURT OF COMMONS

IN PARLIAMENT

AND IN THE COURTS OF

CHANCERY, COMMON PLEAS, AND EXCHEQUER

FROM 1713 TO 1760

WILLIAM BARKER

OF THE BENCH

TWO VOLUMES: ONE OF THE NAMES

OF THE CASES, THE OTHER OF THE PRINCIPAL

MATTERS, CAREFULLY CONTAINED.

VOL. III.

THE SECOND PART, CONTAINING

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THE
P R E F A C E.

SINCE the former Volumes of Mr. Serjeant *Salkeld's* Reports were published with the Approbation of the most eminent Professors of the Law, it may not be improper to inform the Reader, that the following Cases were undoubtedly collected by the same Hand.

This will be very evident to those who read and compare them with the former, because the same Judgment and Perspicuity runs through the Whole; and as an indubitable Proof, that these Cases are Genuine, the Original Manuscript, from whence they were transcribed, written by the Author's own Hand, is now in the Possession of the Editors, and may be seen by any Person that desires it.

This Volume contains more than Four hundred and forty Cases, and altho' the Names of some of them have been already printed, yet they are only the Names, and not the Matter, since the Arguments
both

The P R E F A C E.

both of the Bench and at the Bar are generally new; and in all of them some new Matter is added, which renders this Collection a proper Supplement to those that have been already printed.

There are likewise some Cases abridged in the following Collection, which may be found more at Large in the Cotemporary Reports; but even these may be of some Use, because they are placed under proper Titles in Imitation of *Rolle's Abridgement*; and it may reasonably be presumed, that the learned Serjeant would not have abridged any Cases but those that were suitable to such Titles, and very well worth Observation.

And since Orders made by Justices of Peace, concerning the Removal and Settlement of the Poor, have of late made a considerable Title in the Law, and since it appears by the Author's former Reports, that he took particular Care to State the Resolutions of the Judges in such Cases, the Reader will find in this Volume several Judgments in Cases of that Nature, and those digested under proper Titles, which were never yet printed in any Book of Reports whatsoever.

THE

A

T A B L E

O F T H E

N A M E S of the C A S E S

I N T H E

T H I R D V O L U M E.

A.			
A	<i>Dams versus Tertenants of Savage</i>	Page 321	Boulton v. Arliden 234
	Allen v. Symonds 210, 239		Bourkmire v. Darnell 15
	Anderton v. Waller 86		Brewster v. Kidgill 340
	Anonymus. 1, 2, 3, 23, 25, 31, 42, 45		Bridgwater (<i>Countess</i>) v. Duke of Bolton 315
	50, 55, 58, 61, 70, 79, 80, 81, 83, 84,		Bringloe v. Morrison 271
	102, 107, 120, 122, 123, 131, 136, 146,		Brook v. Bishop 359
	153, 154, 155, 159, 160, 168, 169, 187,		— v. Heynes 19
	189, 191, 214, 223, 238, 251, 260, 265,		Brough v. Perkins 68
	268, 288, 319, 352, 353, 362		Broughton v. Shaw 94
	Arnold v. Jefferson 247		Brown v. Burlace 45, 285
	Ashby v. White 17		Brown v. Tanner 288
	Ashley's (<i>Eliz.</i>) <i>Case</i> 258		Buckley & <i>Ux.</i> v. Collier 63
	Aston v. Adams 82		Bullen v. Benfon 352
	Atkins v. Montague 250		Burr v. Atwood 369
B.			Butcher v. Andrews 15
	Badger v. Lloyd 145		Butler v. Rolls 55
	Baker v. Swinden 283		Buxentine v. Sharp 12
	— v. Lade 306		Buxton v. Gouch 269
	Ball v. Richards 146		
	Banbury (<i>Lord</i>) v. Wood 20		C.
	Banbury's (<i>Lord</i>) <i>Case</i> 213		Carlton v. Mortagh 399
	Baufon v. Offley 38		Chaloner v. Cleyton 306
	Barker v. Keat 124		Chambers v. Workhouse 140
	Barney's <i>Case</i> 56		Charley's (<i>Parish</i>) <i>Case</i> 98
	Bayly's <i>Case</i> 257		Charnock's <i>Case</i> 81
	Beat v. Symphon 352		Cholmley v. Brown 173
	Benbrig v. Day 366		Churchwardens of <i>St.</i> Bartholomew 87
	Bennington's (<i>Sir Cha.</i>) <i>Case</i> 362		Clements v. Langham 144, 167
	Bigland v. Robinson 105		Clerk v. Mundall 68
	Bird v. Strode 12		Clerke's <i>Case</i> 92
	Bishop of <i>St.</i> David's <i>Case</i> 90		Coggs v. Bernard 11, 268
	Blackett v. Gresham 75		<i>College of Physicians</i> v. Rose 17
	Blackhall v. Evans 8		— v. Salmon 102, 237
	Boot v. Johnson 381		Collins v. Deering 227
			— v. Scevington 398
			Cook v. Beale 115
			Cook's <i>Case</i> 337
			Copley

A Table of the Names of

Copley v. Hepworth	Page 108	Groenvelt's Case	Page 265
Cragett v. Glover	56	Groenvelt v. Burwell	354
Cree v. Rolls	246	Grosvenor v. Soame	57
Crockmere v. Paterfon	294	Guillam v. Hardisty	320
Cromwell v. Grunsden	73		
Cropp v. Tilney	225	H.	
Crosse v. Smith	79		
Crowther v. Oldfeild	13	Hall v. Stitch	19
Cudlip v. Rundall	156	— v. Hill	363
Culliford's Case	39	Hallet v. Birch	272
Cumner Parish v. Milton	259	Hambleton v. Lancashire	295
		Hannam v. Redman	109
D.		Harecourt v. Hastings	19
Dalston v. Tyfon	204	Harman v. Renew	89
Davenant v. Rafter	214	Harrison v. Lewis	253
Davis's Case	85	Hartford v. Jones	366
Davy v. Salter	346	Hatton v. Morfe	273
Devise's Parish of St. Mary	80	Helliott v. Selby	355
Dixon v. Willows	239	Henderfon v. Foster	74
Doddington v. Kyme	300	Hide Bridget's Case	178
Dyson v. Glover	60	Hide v. Partridge	227
		Hilton v. Byron	133, 248
E.		Hipsley v. Tuck	249
East v. Estington	400	Hodges v. Steward	68
Edwards v. Copland	283	Hoe v. Nelthrope	154
Elderton's Case	91, 284	Hoile v. Pitt	38
Ellis v. Ellis	197	Hole v. Burgoine	271
— v. Ollave	60	Holt v. Bishop of Winton	280
— v. Thomas	186	Horman v. Hoare	152
Elwaies v. Lucy	117	Horne v. Lewin	273, 344, 356
Evans v. Roberts	146	Howell v. Bell	136
— v. Mantle	290	Hunt v. Brown	34
Ewers v. Jones	227	Huffey v. Fidell	59
		Hutchins, Serjeant at Law	252
		Hutton v. Mansell	16, 64
F.		I.	
Feltham v. Cudworth	59	Jenkins v. Plomb	103
Feverstone v. Scetle	83	— v. Turner	13
Finch v. Renew	145	Ingram v. Bernard	49
Fisher v. Wigg	206	Jordan v. Barlow	67
— v. Nicholls	394		
Fitzhugh v. Dennington	309	K.	
Flower v. Parker	330		
Freeman v. Birnard	44	Keeble v. Hickeringhill	9
— v. Blewett	220	Kellow v. Rowden	178
— v. Shotter	288	Kemp v. Andrews	1
Fuller v. Smith	366	King v. Melling	296
		— v. Perry	23
G.		— v. Rice	90
Gale v. Betts	142	— v. Sharp	57
Gawen v. Westhall	9	The King v. Albertson	361
Germin v. Orchard	222	— v. Alme and Nutt	224
Gibbons v. Dove	56	— v. Atkinson	188
Giles v. Hart	345	— v. Bakestraw	ibid.
Gipps v. Wooliscot	291, 360	— v. Bear	226
Glasse's Case	349	— v. Bengough	171
Goddard v. Smith	245	— v. Bradford	189
Godolphin v. Tudor	251	— v. Brown	189
Greenwood v. Piggott	31	— v. Chester (Bishop)	24, 40, 235
		— v. Crosse	193
			The

the Cases in the Third Volume.

The King v. Edwards	Page 27	Marle v. Flake	Page 118
— v. Ewers	369	Mason v. March	53, 397
— v. Gall	199	Mason v. Abdy	390
— v. Gorge	188	Masters v. Lewis	49
— v. Hall	ibid.	Masters v. Child	66
— v. Harris	313	Mayor of Winton v. Willis	349
— v. Hemmings	187	Mills v. Wilkins	331
— v. Hicks	351	Minton v. Stony-Stratford	260
— v. Holiday	187	Moor's (Sir William) Case	148
— v. Inhabitants of Littleport	232	Morris v. Green	213
— v. — of Oking	256		
— v. — of Penrith	167	N.	
— v. — of Winley	254		
— v. Keat	191	Newdigate v. Selwin	355
— v. Knight	186	Newton v. Travers	103
— v. Knolls	242	Nicholson v. Soldwell	67
— v. Larwood	134	Norris v. Trift	277
— v. Lee, (Lord)	139		
— v. March	172	O.	
— v. Mayor of Andover	229		
— v. — Chester	230	Oades v. Woodward	116
— v. Dartmouth	229	Ogle v. Norcliff	285
— v. St. Nicholas in Abingdon	253	Odison v. Pickering	137
— v. Portington	334	Osbalton v. Stanhope	180
— v. Rains (Sir Richard)	162	Osborn v. Sture	182
— v. Randall	27	Offulstone (Lord) his Case	336
— v. Savill	188		
— v. Somers	104, 194	P.	
— v. Speke	358		
— v. Stonehouse	188	Page v. Heyward	96, 135
— v. Taylor	231	— v. Price	57
— v. Weedon	264	Pagett v. Preston	399
— v. Wright	93	Parker v. Meller	54
		— v. Clerke	87
L.		— v. Wallis	5
Lacy v. Kinafton	298	Parsons v. Petit	165
Lambert v. Thurston	359	Peck's Case	41
Lamplugh v. Shortridge	141, 386	Pett v. Pett	138
Lancashire v. Killingworth	342	Philer v. Boson	130
Layton v. Field	222	Platt v. Hill	330
Lee v. Libb	395	Pleddall v. Freak	152
Lee v. Oxenden	230	Pool v. Longvill	166
Lee v. Brace	337	Pope v. Garland	84
Lepara v. Sir John Germain	235	Powell v. Maine	64
Linch v. Coot	144	Prince v. Bawd	38
Linch v. Clerke	154	Prinn v. Edwards	145
Loder v. Loder	211	Prodgers v. Arther	28
Longfore v. Webber	356	Pullen v. Palmer	207
Luckinton (Parish) v. St. Austins	257	Punting's Case	41
Lunn v. Dodson	201		
Lutton v. King	378	Q.	
M.		Quarne v. Roe	51
Machell v. Garret	64	The Queen v. Branworth	258
Machin v. Moulton	90	— v. Brown	78, 172
Maddox v. Winn	62	— v. Burnaby	217
Mallock v. Eastley	291	— v. Chaffin	66
Mann v. Carey	155	— v. Collingwood	42
Manning v. Bois	320	— v. Coney	230
Marker v. Harris	211, 302	— v. Corbett	261
		— v. Cotefworth	191
		— v. Daniell	191
		The	

A Table of the Names of

The Queen v. Dixon	Page 78	Staple v. Heydon	Page 121
v. Drake	224	Sutton v. Moody	290
v. Franklin	351	Swinsted v. Smith	218
v. Goddard	171		
v. Gower	230	T.	
v. Griffith	169	Thetford (<i>Mayor's Case</i>)	103
v. Guife	88	Thompson v. Wood	65
v. Holford	199	——— v. Davenant	86
v. <i>Inhabitants of Wiltshire</i>	381	——— v. Leech	300
v. Lane	190	Thornborough v. Whitacre	97
v. Langley	<i>ibid.</i>	Thurston v. Slatford	155
v. London	265	Tilden v. Palfriman	150
v. Rawlings	185	Tracy v. Talbot	260
v. Ride	133, 289	Tregarne v. Fletcher	302
v. Steer	189, 291	Trevivian v. Lawrence	151
v. Tayler	198	Tudy v. Pastow	257
v. Tracy	192		
v. White	232	W.	
R.		Wallis v. Wood	4
Radbourn v. Kennedy	354	Wankford v. Wankford	162
Rands v. Tripp	65	Ward v. Evans	118
Read's <i>Cafe</i>	350	Watts's <i>Cafe</i>	172
Redshaw v. Hester	180	Watts v. West	211
Reynolds v. Blake	25, 40	Watson's (<i>Stephen</i>) <i>Cafe</i>	26
Rich v. Doughty	149	Way v. Yelley	381
Roe v. Haugh	14	Wayland (<i>Sir Robert</i>)	234
Rogers v. Reersby	8	Western v. Creswick	214
Roffington's <i>Cafe</i>	175	West v. West	274
Ruth v. Weddall	285	Wharton v. Lisle	349
S.		Wheeler v. Baker	10
Salisbury v. Proctor	130	White v. England	42
Sanders v. Lewin	31	Whitehall v. Squire	161
Sanders v. Owen	250	Wiatt v. Evans	55
Sands's (<i>Sir Geo.</i>) <i>Cafe</i>	22	Wilkins v. Mitchell	229
Savery v. Smith	36	Williams v. Harrison	197
Savill v. Roberts	16	——— v. Hoskins	32
Score v. Bowles	197	Williams v. Croy	148
Scott v. Hodgson	346	Willis v. Paterhal	283
Screvenham (<i>Parish</i>) v. St. Nicholas	255	Wilson v. Armorer	157
Searl v. Bunion	220	Winter v. Price	330
Sheer v. Brown	17	Withers v. Kelsey	65
Sheppard v. Tailour	219, 272	Withers v. Harris	319
Skinner v. Kilby	210	Witts v. Polehampton	305, 398
Slater v. May	22	Woodier v. Gresham	63
Smalcomb v. Buckingham	159	Woolridge v. Cloberrie	117
Smartle v. Penhallow	181	Wolfston v. Skater	94
Smith v. Arnold	4	Wooton Rivers (<i>Parish</i>) v. St. Peter's <i>in</i>	
—— v. Westhal	9	Marlborough	254
—— v. Waller	378	Y.	
—— v. Airy	14, 175	Yates v. Harlakenden	209
Snow v. Firebraffe	320	Yeoman v. Bradshaw	70, 164
Sparks v. Wood	173	Z.	
Spencer's <i>Cafe</i>	258	Zouch v. Thompson	35
Stanfast v. Chamberlaine	215		
Stanfit v. Hicks	135		

ABATE-

* Abatement.

* P. 1

Anonymous. Mich. 4 Ann.

AN Administrator brought an Action of Debt on a Bond, the Defendant pleaded in *Abatement*, that Administration was granted to another, and upon a Demurrer it was insisted, that though this is Matter in Bar, yet it might be pleaded in Abatement; for so it is in the Case of *Outlawry* and *Property*, which may be pleaded either in Bar or in Abatement: but *per Holt*, Ch. Just. it was ruled, that the Defendant should answer over, for Matter in Bar must not be pleaded in *Abatement*. Matter in Bar may not be pleaded in Abatement.

Kemp versus Andrews. Mich. 2 Will. 3. B. R. Rot. 289.

IN *Trover and Conversion*, the Plaintiff declared, that he, together with *A.* and *B.* both now dead, and whom he survived, being possessed of a Ship and Goods, lost them, and that the Defendant found and converted them to his own Use, who pleaded in Bar to the Action, that the said *A.* and *B.* made their Wills in Writing, and thereby appointed several Executors and died, and they in their Lifetime, together with the Plaintiff, were possessed of this Ship and Goods as Merchants, and that there is no *Survivorship* between Merchants, and so concludes in Bar; and upon Demurrer to this Plea it was adjudged ill in Bar, but it had been a good Plea in *Abatement*. 3 Lev. 290. Where a Plea is ill in Bar, but good in Abatement.

* Ability and Disability.

* P. 2

Anonymous. Mich. 2 Ann.

A Woman was appointed by the Justices to be Governess of a Work-house at *Chelmsford*, and Mr. *Parker* moved to quash the Order, because it was in the Nature of a House of Correction, and so the Office was not suitable to her Sex: But *per Powel* and the rest, *absente Holt* Ch. Just. 'tis a good Appointment, and she may be capable of executing the Office either by her self or Deputy, as the Lady *Broughton* did, who was appointed Keeper of the Gate-house at *Westminster*. A Woman may execute an Office by her self or by Deputy.

Acceptance.

ADJUDGED, that where a Man is intitled to a Thing in *Gross*, he is not bound to accept it by *Parcels*; as for Instance, if *A.* be bound to deliver a Ton of Wine to *B.* and tenders Part of it, *B.* is not bound to accept it. Where the Title is to a Thing in Gross, a Man is not bound to accept it by Parcels.

Acceptance.

Lessor is not bound to accept Part of the Rent.

So where the Lessor *distrains for Rent in Arrear*, and the Lessee *tenders Part of it*, the Lessor is not bound to *accept* it; but if he distrain for Arrears due at *several Days*, on which it ought to be paid, and the Lessee tenders the Arrears due on such a Day, the Lessor is bound to accept it. The Case is the same if the Lessor *bring an Action of Debt instead of distraining* for the Rent due on several Days, but if there is no tender of any Part, and the Lessor get Judgment for the Whole, 'tis now become an entire Duty, and if upon Execution sued out the Lessee tenders any Part of it, the Lessor is not bound to accept.

In Detinue the Plaintiff is not bound to accept Part.

So in *Detinue* for divers Parcels of Goods, if the Plaintiff get Judgment for the Whole, and after Execution taken forth the Defendant tenders some Part to the Plaintiff, he is not bound to accept it.

* P. 3

No entry for a Forfeiture after Acceptance of the Rent.

* See 3 Rep. Pennant's Case. Cro. Eliz. 453. Moor 456. S. C.

† 2 Bulst. 151. Cro. Eliz. 715.

† 2 Cro. 398. 1 Roll. Rep. 389.

* Lease for Years, rendering Rent, Proviso to be forfeited if the Lessee aliened or assigned to another; the Lessee *aliened*, and the Executor of the *Alienee* paid the Rent to the Lessor, and though it was not alledged, that he did know the Lease was * *aliened*, (*viz.*) by Assignment to another, but only that he (the Lessor) knowing the other to be the Executor of the Assignee, had accepted the Rent of him; it was adjudged he should not enter for a Forfeiture against his own † *Acceptance*, for it shall be intended he had Notice of the Assignment, if the contrary doth not appear. See † *Witchcot's Case*.

So if the Lessee covenant for him and his *Assigns to repair*, the Assignee of the Lessee by his *accepting* such Assignment is liable, for this is a Covenant which runs with the Land.

Dyer 195. Roll. 475.

The Husband and Wife made a Lease of the Lands of the Wife, then the Husband died, and the Wife married again, and this second Husband *accepted* the Rent. Adjudged, that by such Acceptance he had affirmed the Lease, even *quoad* the Wife her self, because she had resigned her Election to her second husband, and he by his Acceptance of the Rent had affirmed the Lease.

1 Inst. 211. 1 Leon. 262.

Lease to W. R. for Life, rendering Rent at *Michaelmas*, with a Clause of Re-entry for Non-payment, the Rent was in Arrear, and afterwards the Lessor brought an Action for the Rent. Adjudged, that notwithstanding this Action he (the Lessor) might still enter for a Breach of the Condition, for the Action for the Rent did not affirm the Lease, because it shall be intended to be brought as for a Duty due upon the Contract; but if he had *distrained* for the Rent not being paid on the Day, then he can never afterwards enter for a Breach of the Condition, because the *Distress* affirms the Continuance of the Lease.

3 Rep. 64. Where Acceptance of the Rent is no Affirmance of the Lease.

A Gift was made to the Husband and Wife, and to the Heirs of their Bodies, they afterwards made a Lease of the Lands, reserving Rent on such a Day, with a Clause of Re-entry, then the Husband died, and the Rent being in Arrear, the Issue in Tail accepted it. Adjudged, that this was no Affirmance of the Lease as to himself, because the Rent was not due to him whilst his Mother was living; but it had been otherwise, if he had accepted it after her Death.

Acceptance of Rent after the Day of Payment no Bar to a Right of Entry.

* P. 4

Adjudged, That an Acceptance of a collateral Thing is no Bar to a Title of Freehold, and that an Acceptance of Rent after the Day of Payment will not bar a Right of Entry vested by Non-payment, because the Rent being a Duty, and owing, * the Party might well accept it; but 'tis otherwise after a *Distress* taken, or if the Rent is accepted at another Day subsequent, for this affirms the Continuance of the Lease.

Anonymous,

Acceptance.

* Anonymous.

* P. 4

LEASE for Years upon Condition to be void, if the Lessee assigns over the Term; he afterwards made an Assignment, and the Lessor knowing it accepted the Rent. Adjudged, this will not make the Lease good, because it was absolutely void before the Acceptance. Acceptance of Rent will not make a Lease good.

Smith *versus* Arnold.

THE Statute * 32 H. 8. enables a Grantee of a Reversion to enter for a Condition broken, and to bring an Action of Covenant, &c. The Case was, Lessee for Life covenants for himself, his Executors and Administrators, to build an Outhouse on the Lands of the Lessor, and afterwards the Lessee for Life assigns his Estate to T. S. The Question was, whether such Assignee might be charged in an Action of Covenant, if the Outhouse was not built? It was insisted, that he could not, because the Assignor had covenanted only for himself, his *Executors and Administrators*, leaving out the Word *Assignes*, which is very true: But adjudged, that the Assignee by the ** *Acceptance of the Possession of the Lands*, had made himself subject to all the Covenants which run with the Land, of which Repairing is one, Building is another, and to such he is bound without being named by that special Word *Assignes*, but not to any collateral Covenants. * Cap. 34: Assignee is liable to all Covenants which run with the Land.
† 1 Salk. 199.
** 2 Cro. 125. Godb. 69. 5 Rep. 24. Moor 399.

Wallis *versus* Wood.

LEASE for Years was made to T. S. rendering Rent, which being in Arrear the Lessee died Intestate, and Administration was granted to the Defendant, against whom an Action of Debt was brought for the Rent, who pleaded, that the Intestate had assigned the Term, and that after such Assignment the Lessor had accepted Rent of the Assignee. The Parties were at Issue upon the Acceptance of the Rent, and the Plaintiff had a Verdict; but because Part of the Rent became due, pending the Action, the Plaintiff could never get Judgment. When Part of the Rent became due, pending an Action against an Administrator.

* Parker *versus* Webb.

* P. 5

THE Case was, the Lessor being seised in Fee, made a Lease of the Lands for Years to the Defendant, rendering Rent at *Michaelmas* and *Ladyday*, in which Lease the Defendant covenanted to pay the Rent, &c. afterwards the Lessor granted the Reversion to the Plaintiff, to which Grant the Defendant attended, and an Action of Covenant being brought against him for Non-payment of Rent, he pleaded, that he had assigned his Term to D. D. before the Grant of the Reversion made to the Plaintiff, and upon a Demurrer to this Plea, *per Holt* Chief Justice, 'tis ill; for he ought to have set forth, that the Plaintiff had accepted Rent from the Assignee, or that he had Notice of the Assignment; but if that had been pleaded, the Plaintiff should still have Judgment, because he, being Grantee of the Reversion, may maintain this Action against the Lessee, even after the Assignment of the Term, and though he had accepted the Rent after such Assignment; and this he might do upon the express Covenant of the Lessee to pay it, which is a Covenant that runs with the Land. Grantee of a Reversion may have Covenant after the Assignment of the Term.

Action

Action in General.

2 Willon. 251. 2 Salk.
603.

AD J U D G E D, that a *Scire Facias*, or any Writ to which the Defendant may plead, is an *Action*, or by which a Plaintiff may recover.

In *Personal Actions*, if the Plaintiff is barred, as in an Action of Debt or Account, he can never bring the same Action again, nor hath he any Remedy but by Writ of Error, or Attainting the Jury.

But in *Real Actions*, if the Plaintiff is barred he may resort to a higher Remedy; as if he is barred in an *Affise* he may bring a *Mortd'ancestor*; if in a *Formedon in Descender*, he may bring a *Formedon in Reverter* or Remainder.

4 Rep. 43. Moor pl.
416. *Hudson's Case*.

If a Man recover in *Trespass* he shall not afterwards have *Mayhem*, for 'tis to get the same Recompence again; but he may have an Appeal of Robbery, because the Judgment is not for Damages, but against the Life of the Defendant.

2 Cro. 75. Yelv. 67.
* P. 6

* Where two are bound jointly and severally in a Bond, and the Obligee gets Judgment against one and takes him in Execution, yet he may proceed against the other, because the Debt is not paid or satisfied.

And so he may, if the Sheriff suffer him, whom he had in Execution, to escape.

One promises to pay *W. R.* 40 *l.* (*viz.*) 10 *l.* on such a Day, and so on till all is paid; an Action lies upon the first Failure of Payment.

* Cro. Eliz. 118. 1 Cro.
241. 1 Inst. 292.

So 'tis in * *Covenant*, and so 'tis in a *Recognizance*.

But if a Bond of 40 *l.* is given conditioned to pay (*viz.*) 10 *l.* on such a Day and so on, Debt will not lie till the last Day.

Owen 42. 1 Cro. 241.
2 Saund. 337.

But if the Bond is to pay 20 *l.* on such a Day, and 20 *l.* on such a Day, there Debt will lie upon the first Failure; therefore there is a Difference where a Bond is to pay 40 *l.* (*viz.*) 10 *l.* on such a Day, and so on, and where 'tis to pay 20 *l.* on such a Day, and 20 *l.* more on such a Day, because in the Case of the *videlicet*, though the Duty is entire, the *videlicet* divides the Parcels.

But where a Man is bound in a Bond to pay 100 *l.* (*viz.*) 50 *l.* on such a Day, and 50 *l.* on such a Day, Debt lies upon the first Failure, because the Condition is broken.

Cro. Eliz. 68, 110.

Where it appears upon the Record, that the Action is brought before the Cause of Action arises, either in the Declaration or in the Verdict, or otherwise by the Plaintiff's own Shewing, he shall never recover; but where it is a Matter alledged by the Defendant, but not insisted on, so that Issue is taken upon another Point, and the Truth of the Fact alledged doth not appear, there the Plaintiff shall have Judgment, if he recover.

* P. 7

* Action Popular.

AD J U D G E D, that the King has no Privilege in an Action *qui tam pro Domino Rege, &c.* and that the Prosecutor may pray a *Tales* without the Consent of the Attorney General, and he may be Nonsuit.

Et per Holt, Chief Justice. Where a certain Penalty is given by a Statute to the Party grieved he needs not join the King, for 'tis like a private Act, only for his Benefit.

433.
126, 193. But it lies for * *Indicting a Man in a Foreign Country*; it lies for a † *Scandalum Magnatum*, for the King is prejudiced by the Act, which is the Ground of the Action.

Actions on the Case.

It lies against the Sheriff if one taken upon a *Capias Ulagatum* escape, or against the Rescuer, if he be rescued; but the Plaintiff is not bound to bring it in *Tam quam*, &c. but may bring Debt alone in his own Name. *Et nota*, In these Cases, tho' the Action is in the *Tam quam*, the Party shall have all the Damages; but in some Cases, as upon the Statute of *Hue and Cry*, and the Statute for not appearing as a Witness, being served with a *Subpœna*, the Party may either bring *Debt* or *Case*; if he bring *Debt*, he must sue without the King, for the Debt is not due to him, but to the Party grieved; but if he bring an Action on the Case, he must sue in the *Tam quam*, for the Action is founded on the *Tort* only, and that is to the King as well as to the Party, *per Holt*, Chief Justice.

Roll Abr 1. 2 Cr. 301, 620. Bridgm. 8. 1 Roll. Rep. 78.

Nota, The following Rule was made by the Court in January 1682. That all Clerks of the Assize and Associates do return the *Posseas in all Popular Actions and Informations Qui tam*, &c. into the respective Offices from whence they Issue, and to receive their Fees for the returning thereof at the Trial from the Party, for whom the Verdict shall be given, and that the Masters of the respective Offices, to whom the said *Posseas* shall be returned by the Clerks of Assize shall send a Note into the Exchequer to the Clerks of the Estreats, that the Sheriffs of the respective Counties may be charged with the same."

Raym. 479. S. C. Clerks of Assize to return the *Posseas* in all Popular Actions.

* Actions on the Case.

* P. 8

Good and not good, where brought before the Time of Action.

Rogers *versus* Rearsby. Pasch. 2 Annæ. 2 Ld. Raym. 870. S. C.

IN *Ejectment*, the Demise was laid on the 20th Day of October; upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, That the * *Effoin-Day*, which in the Law is accounted the first Day of the Term, was on the same 20th Day of October, on which the Demise was laid, and so this *Ejectment* was brought by the Plaintiff before he had any Cause of Action; but this Objection was not allowed, for *per Curiam*, the Action and the Wrong may be upon one and the same Day, and this being by Original may be sued out after the Commencement of the Term, and returned, especially in so long a Term as *Michaelmas* Term is; but admitting it to be a Slip, the Defendant should have taken Advantage of it upon *Oyer*.

The Effoin-Day was the Day in which the Demise was laid, and good. * 1 And. 240.

Blackhall *versus* Evans. Mich. 3 Georgii.

IN *Assault and Battery*, upon Not guilty pleaded the Plaintiff had a Verdict; it was objected in Arrest of Judgment, That the Battery was laid to be committed on a Day † not come when the Verdict was given; but this Objection was disallowed, because it being impossible it should be committed after the Verdict was given, 'tis as if no Time at all had been laid in the Declaration, for an impossible Time is no Time, and in such Case it can never be intended that the Jury gave Damages for a Battery which was not then done: 'Tis true, if the Plaintiff had laid a Time *after the Action and before the Verdict*, the Damages must be intended to be given for the Battery then done, that is, at the Time of the Action brought; but that ought not to be, † because at that Time the Plaintiff had no Cause of Action.

Battery laid to be done on a Day not yet come. † 1 Lev. 299.

* Hob. 189. 245, 277: S. P.

† Cro. Eliz. 68, 110. ad. Raym. 463.

Actions on the Case.

* P. 9

* *Smith versus Westhal.* 1 Ld. Raym. 316. S. P. Comyns 49, 50. S. P.

* 29 Car. 2. cap. 3. Par. 17. Where a Memorandum in Writing is not necessary, See postea *Bourkmire v. Darnell.*

BY the Statute of * *Frauds, &c.* 'tis enacted, *That no Action shall be brought upon any Agreement, which is not to be performed within a Year after the making thereof, unless there be a Memorandum of the Agreement in Writing, and signed by him who is to be charged therewith.* An Agreement was made, that in Consideration of 5 l. paid by the Plaintiff to the Defendant, he (the Defendant) promised to pay the Plaintiff 10 l. upon his Day of Marriage, which happened about 9 Years after this Agreement; and now an Action being brought upon this Promise, it was adjudged, that a *Memorandum in Writing* was not necessary in this Case, because the Marriage might have happened within a Year after the Agreement made.

Sawen versus Hulbert.

In *Trover*, the Declaration was General, as of Michaelmas Term, and the Conversion was laid on a Day certain in that Term, and yet good.

IN *Trover* the Plaintiff had a Verdict, and it was moved in Arrest of Judgment that the Declaration was ill; because the *Conversion* was laid on a Day certain in *Michaelmas Term*, and the Declaration was General as of that very Term without a Day certain; as *Memorandum*, that on such a Day, and therefore it must relate to the first Day of that Term, and if so, then this Action was brought before the Plaintiff had any Cause of Action, because it was brought as on the first Day of the Term, and the *Conversion*, which is the Foundation of the Action, was laid in the Declaration to be after the Term began. But *per Holt*, Chief Justice, 'Tis well enough, if the Bill was filed after the Cause of Action accrued, for there was no Action depending till that very Time, and the filing the Bill was on a Day certain.

For Malefeasance, Misfeasance and Negligence.

Keeble versus Hickeringhall.

Case lies where the Plaintiff had a Possession without any Property.

* P. 10

CASE, &c. in which the Plaintiff declared, that he was possessed of a *Decoy Pond* frequented with *Ducks*, of which he made great Gains, and that the Defendant knowing and maliciously intending to deprive him (the Plaintiff) of the Use and Benefit of his said *Decoy Pond*, did on such a Day and Place, at one Time, discharge and shoot off six Guns, and at another Time 4 * Guns to fright away his Ducks, &c. upon Not guilty pleaded the Plaintiff had a Verdict; 'twas objected in Arrest of Judgment, That the Defendant stood on his own Ground, and so could not be guilty of a Trespass in the Close of the Plaintiff; besides, the Declaration is ill; for the Plaintiff did not set forth how many Ducks were frightened away, or if he had, it had been ill, because being Wild-Ducks, he had no Property in them. *Holt*, Chief Justice. A *Decoy Pond* is a Kind of Trade, and of great Profit to the Owner, and by the same Reason that an Action will lie for malicious Words spoken by one Tradesman of another, it will lie for a malicious Act done by one to another, for in both Cases 'tis prejudicial to the Plaintiff. If one Man keeps a School in such a Place, another may do so likewise in the same Place, though he draw away the Scholars from the other School, 'tis true, this is *damnum*, but 'tis *absque injuria*; but he must not shoot Guns at the Scholars of the other School, to fright them from coming there any more. And as to the other Objection, the Plaintiff needs not shew how many Ducks were frightened, because 'tis impossible for him to do it, and though they were Wild, yet they were *fluminea volucres*, and in the Plaintiff's *Decoy Pond*, and so in his Possession, which is sufficient, without shewing that he had any Property in them.

Wheeler

Actions on the Case.

Wheeler *versus* Baker. Mich. 8 Gulielmi.

LESSEE of a House for 3 Years, Assigns it to W. R. for 3 Years by Parol; the House was afterwards burnt, and the Assignor brought an Action on the Case against the Assignee for Damages. Adjudged that it would not lie, because he had no *Residuary Interest* in the House, neither is he liable over to the first Lessor, because the Assignment was lawful: The Case had been the same, if he (the Plaintiff) had demised to W. R. for 5 Years, for this would only have amounted to an Assignment of his Term, so that he gains no Reversion by it; 'tis true, it had been otherwise, if the Lease had been by *Indenture* or *Estoppel*; but if the Lessee had assigned for *two Years*, he might have an Action against W. R. the Assignee, because there was a Reversion in him (the Lessee) and in such Case 'tis always necessary for him to declare, that he had an Interest *ad tunc veniur* (*viz.*) when the House was burnt. But this Action is now taken away by the Statute * 6 Annæ, by which 'tis enacted, That no Action shall be maintained against any one in whose House or Chamber any Fire shall accidentally begin; and if any Action shall be brought, the Defendant may plead the General Issue, and give this Act in Evidence, and if the Plaintiff be Nonsuit, discontinue, or a Verdict be against him, the Defendant shall have treble Costs. Proviso, that nothing therein shall make void any Agreement between Landlord and Tenant. * This Act was only Temporary for 3 Years; but by another Statute Anno † 10 Annæ, this Clause was made Perpetual.

Where the whole Term was assigned by Parol, the Assignor cannot have an Action, because he hath no Residuary Interest.

* 6 Annæ cap. 31.

* P. 11

† 10 Annæ cap. 14.

Coggs *versus* Bernard. Trin. 2 Annæ. 2 Salk. 733. the Pleadings, 2 Ld. Raym. 909. S. C. Comyns 133. S. C.

IN an Action on the Case against the Defendant for his Negligence in performing what he had undertaken to do; there was a Verdict for the Plaintiff, and it being objected in Arrest of Judgment, That in this Case there was no Consideration to intitle the Plaintiff to an Action, for the Defendant was to have no Reward; and it did not appear, that he was a *Common Carrier or Porter*, so that by Custom or Usage he might lawfully claim a Reward. Holt, Chief Justice, in arguing this Matter, declared, That if the Agreement had been only Executory (*i. e.*) if the Defendant had assumed to take up the Hogshead of Brandy out of one Cellar, and lay it down in another (which was this Case) and had not done it, this Action would not have laid against him, like the Case in 11 H. 4. 33. when the Action was brought against the Defendant, upon a Promise to build a House for the Plaintiff, by such a Day, which he had not done; it was held, that the Action would not lie, for the Reason before mentioned; but that differs from the principal Case, because the Defendant had actually entered upon the Performance of the Thing which he had promised to perform, and the Plaintiff relying on the Defendant's Promise, had trusted him to do it, who by his Negligence had deceived him, and 'tis the *Deceit* which is the Ground of this Action; 'tis true, the Defendant was not bound to enter upon this Trust, but if he doth, he must take Care that the Plaintiff be not damnified by his Neglect. He admitted, That there was a Contrary Resolution * in *Yelv.* (*viz.*) That if W. R. deliver Goods to L. R. and in Consideration thereof he promise to redeliver them; yet no Action will lie against him, if he doth not redeliver them; which Resolution is not Law. That in † 2 Cro. it was otherwise resolved (*viz.*) where Money was delivered to one to pay over to another *sine mora*. Adjudged, That an Action would lie against the Defendant, if he did not pay it over; for though he had no Benefit by this Undertaking, yet, if he take the Trust upon him, he is bound to perform it. See 3 H. 6. 36. Owen 141. Keilw. 160. He likewise held, That where a Man carrying Goods is of a publick Employment; as a *Carrier, Wharfinger, Hoy-man, or Master of a Ship*, he must answer all Events, excepting only the Acts of God, and the Enemies of the King, and that this is a Politick Establishment, for the Safety of all Persons concerned, and whose Affairs necessitate them to entrust such Carriers; for by this Means all private Combinations between them

1 Salk. 26. Case lies against the Defendant, where he enters on a Thing agreed on, and doth not perform it.

* Yelv. 128.

† 2 Cro. 667.

Actions on the Case.

* P. 12

them and * *Highwaymen*, and other Robbers, are prevented, which cannot easily be discovered. But if a Bailiff or Factor carries Goods, and is robbed, he is not liable to the Owner, though he hath a *Premium*, because 'tis only a particular Office, and a private Trust; he doth the best he can, and it would be unreasonable to charge him with a Trust farther than the Nature of the Thing puts it in his Power to perform. The same Law of a *Factor*: therefore if he is robbed, he shall not be chargeable, for 'tis sufficient, if he takes the same Care that the Owner himself would have done. But where Goods are delivered to be carried *gratis*, or to do any Thing about them, without any Reward, which is called by *Bracton* * *Mandatum*, and in *English*, *acting by Commission*; this also obliges him to a diligent Management and Care of the Goods which is implied in the very Undertaking; and though the *Trust was Voluntary*, yet by the Breach thereof, a Fraud is put upon the Deliverer, which is a sufficient Ground to support this Action.

* Lib. 3. 100.

Bird versus Stroud. Trin. 8 Will. 3. B. R.

Where the Action is grounded on the Possession, the Plaintiff needs not shew a Title.

CASE, &c. in which the Plaintiff declared, That he being *possessed* of a Tenement (to which he had and ought to have a Way) and to which he had, and ought to have Common of Pasture in D. the Defendant had digged *Cony-Boroughs* there, *per quod*, &c. Upon Demurrer to this Declaration, the Defendant had Judgment in C. B. and now upon a Writ of Error in B. R. that Judgment was affirmed: The Objection was, That the Plaintiff had not shewed any Title to this *Common*, either by *Grant or Prescription*, and adjudged he need not, because the Action is grounded upon the * *Possession*, and it doth not appear but that the Defendant is a mere Stranger; besides the Title is not *Traversable*, but to be given in Evidence upon the Trial of the Issue.

* 2 Cro. 43, 122. Cro. Car. Sands ver. Trefusis. 1 Vent. 356. S. P.

Buxentine versus Sharp. Pasch. 8 Will. 3. B. R. 2 Salk. 662. S. C.
1 Ld. Raym. 169. cited. 2 Stra. 1264. S. P.

Action will not lie for keeping a Mad Bull without saying *scienter*.

THE Plaintiff declared, That the Defendant kept a *Bull*, which used to run at Men, but did not say *sciens* or *scienter*; and this was adjudged ill after a Verdict, because the Action will not lie, unless the Owner knew the Quality of his Bull, and it cannot be intended that this was proved at the Trial, because the Plaintiff is not bound to prove more than is laid in his Declaration.

* P. 13

* *Jenkins versus Turner.* 1 Ld. Raym. 109. S. C. 2 Salk. 662. S. C.

Case against the Defendant for keeping a Boar which used to bite *Animalia*, not saying what Animals, good.

THE Plaintiff declared, That the Defendant kept a *Boar*, *ad mordendum animalia consuet*, and that he knew of this Quality; after a Verdict for the Plaintiff, and a Motion in Arrest of Judgment, this Declaration was held good, though it was objected, that *Animalia* mentioned in the Declaration might be *Frogs*; for it shall be intended the Proof at the Trial was, that this Boar bit such *Animals* as will support the Action, otherwise the Jury would not have found a Verdict for the Plaintiff, and have given Damages. There was another Objection to this Declaration (*viz.*) That the Defendant cannot know what *Animals* he is to defend against; but it was answered, no Evidence could be given of killing or biting any *Animals* but of such of which he had *Notice*.

Crowther versus Oldfield. Pasch. 2 Annæ Rot. 233. B. R. 2 Ld. Raym. 1225. S. C. 1 Salk. 170, 364. S. C.

6 Mod. 19. 1 Lutw. 126. 1 Salk. 364. Where a Copyhold is pleaded, the Omission of the Words *tenent' ad voluntatem Domini* makes it ill.

CASE, &c. for disturbing him in his *Common*, in which the Plaintiff declared, That he was seised of a *Messuage*, &c. Parcel of the Manor of W. *Tent' per Copiam rotulorum Curie ejusdem manerii ut tenen' Custumarius in feodo simpliciter secundu' consuetudinem Manerii*, and that he and all the Tenants of the said Manor, had, Time out of Mind, *Common* on the Wastes of the said Manor, for all Beasts

Actions on the Case.

Beasts *Levant and Couchant* upon their Copyholds. This Declaration was adjudged ill after a *Verdict* which had found it to be *Parcel of the Manor*, as the Plaintiff had set forth in his Declaration, because the Words *ad voluntatem Domini* being left out, it doth not appear to be *Copyhold*; so that taking it to be *Freehold* and not *Copyhold*, then the *Prescription* should have been by a *Que Estate* at *Common Law*, in his own Name, and not in the Name of the Lord. In arguing this Case, *Holt* Chief Justice, said, That a Copyholder hath Right of Common, either as *belonging to his Estate*, or to his *Land*; that where it belongs to his *Estate*, and as such he claims Common in the Lord's Waste there, if the Copyhold is enfranchised, the Common is lost and extinguished, for that continues when the *Estate* is gone: the other Common is as *belonging to his Land*, (*viz.*) where a Copyholder hath Common in the Wastes of another Manor, in that Case the Common is not lost by an Infranchisement of the Copyhold, because though the *Estate* is gone, the *Land* still continues. It was argued for the Plaintiff in the Original Action, That this Title set forth in his Declaration (admitting it to be * bad) ought to be recited as Unnecessary and Surplusage, and the rather, because * P. 14 there was no occasion for him to set forth any Title; he had the *Possession*, and that is sufficient against the Defendant, who was a Stranger and Wrong-doer, which is very true; but if he will set forth a Title, as he had done in this Case, and that Title is inconsistent in itself, a *Verdict* will not help it; now here he could have no Title as a *Copyholder*, because it doth not appear that he held *ad voluntatem Domini*, and he could have none as a *Freeholder*, because he had prescribed in the Manor, so that his Title being absurd and inconsistent, the Declaration must be ill; and for that Reason the Judgment in *C. B.* was now affirmed in *B. R.* for Defendant in Error.

Smith *versus* Ary. Hill. 2 Annæ. B. R. 2 Ld. Raym. 1034.
S. C.

THE Plaintiff declared, That in Consideration he had agreed and promised the Defendant to play at such a Game, and to pay what he lost, the Defendant promised to play, &c. and to pay, &c. and sets forth, that they played, &c. and that the Defendant lost so much, which he had not paid; *Cumque etiam*, he (the Plaintiff) had won so much Money *ad ludum pred'*, the Defendant in Consideration *inde*, promised to pay, &c. Upon a Demurrer to this Declaration it was insisted for the Plaintiff, that the mutual Promises in the first Count must be understood as if repeated in the second, (*viz.*) That the Playing was upon the same Agreement, being alledged to be won, *ad ludum pred'*. *Sed per Curiam*, The second Count is not the better for the first, for they are separate and distinct, so that the Agreement laid in the first will not go to the second; and that an *Indebitatus Assumpsit* will not lie for Money won *at Play*, so there was nothing but * mutual Promises, and Debt will not lie upon a Promise, nor by Consequence an *Indebitatus*, but there must be a Consideration, or a *Quid pro quo*, &c. Postea. Gaming. (1.)
6 Mod. 128. Indebitatus
Assumpsit will not lie for
Money won at play.

* Hob. 18, 88. 1 Vent.
51, 44, 96, 153. Hard.
486. 3 Lev. 118.

Roe *versus* Haugh. Pasch. 9 Will. 3. in Camera Scaccarii.

THE Case was, *B.* was indebted to *A.* in 42 *l.* and *C.* in Consideration that *A.* would accept him to be his Debtor for the 42 *l.* due to the said *A.* by and from *B.* *super se Assumpsit* & *eidem A. fideliter promisit quod ipse eandem 42 l. would pay to him.* And an *Assumpsit* was brought against *C.* averring him *fore debitorem ipsius A.* without saying, that *B. was discharged*; and upon *Non Assumpsit* there was a *Verdict* for the Plaintiff * in *B. R.* and which was afterwards affirmed in the *Exchequer Chamber*, for being after a *Verdict*, they held they ought to do what they could to help it; and therefore not taking it as a Promise only on the Part of *C.* because as such, it could not bind him, unless *B. was discharged*, they construed it to be a mutual Promise, *viz.* That *C. promised A. to pay the Debt*, and in Consideration thereof, *A. promised to discharge B.* What shall be mutual
Promises after a Verdict.

* P. 15

Actions on the Case.

Butcher *versus* Andrews. 2 Salk. 731. The Pleadings.

1 Salk. 23. S. C. Where an Action is brought for more than the Defendant promised to pay, 'tis not good.

IN *Assumpsit* the Case was, the Father was bound by his Promise to pay the Plaintiff so much Money as he should lend the Son, and for such Goods as he (the Plaintiff) should let the Son have, so as the Money lent, and the Goods sold and delivered to him (the Son) *did not exceed 5 l.* The Action was brought for 5 l. Money lent, and likewise for 5 l. *being the Value of the Goods sold and delivered*, and likewise for so much Money *mutuo dat' & accommodat'* to the Son at the Father's Request. Upon *Non Assumpsit* pleaded, the Plaintiff had a Verdict, and 3 l. Damages: But upon a Motion in Arrest of Judgment, this Verdict was set aside; for 'tis plain, the Defendant would not be indebted for more *than 5 l.* because he engaged for no more, and if the Jury had given more it had been naught; 'tis true, they gave but 3 l. Damages, but yet that will not help the Declaration, which was for 5 l. Money lent, and for 5 l. the Value of the Goods delivered, and it doth not appear to the Court, but that the Defendant hath paid 5 l. already, and this now claimed is over and above.

Bourkmire *versus* Darnell. Mich. 3 Annæ.

1 Salk. 27. S. C. 6 Mod. C. 248. Where there is a collateral Undertaking for the Act of another, it must be in Writing. See *antea Smith versus West-hall*.

AS S U M P S I T, &c. In which the Plaintiff declared, That the Defendant in Consideration he (the Plaintiff) at the Instance and Request of the Defendant, would lend and deliver to one *Joseph English unum Spadonem* of him the said Plaintiff, to ride to *Reading in Berkshire*; he (the Defendant) *Assumpsit*, and promised to the Plaintiff, that the said *Joseph* should redeliver the said Gelding safely to him the Plaintiff. Upon *Non Assumpsit* pleaded, the Evidence at the Trial was, That the said *Joseph English* would have hired the Gelding of the Plaintiff, but could not prevail with him till the Defendant came, and did undertake for the Redelivery; upon which the Counsel for the Defendant insisted, that the Plaintiff ought to produce a *Note in Writing* of this Agreement, which being over-ruled, there was a Verdict for the Plaintiff; and it was moved in Arrest of Judgment, and *per Curiam* adjudged, That it was void by the * Statute of *Frauds*, because it was a collateral Undertaking for the Act of another, and in such Case the Statute requires, that it must be in Writing. The Difference is, where the *whole Credit is given to the Undertaker*, in such Case the third Person is in Nature of a Servant, and there is no Remedy against him; 'tis true, the Undertaking is good, but 'tis not within the Statute, and therefore not requisite it should be in Writing; but where the Undertaker comes in Aid only to procure or obtain Credit for another, so that the Remedy may be against both, this is a collateral Undertaking for another, and made void by the Statute, if 'tis not in Writing. *Et per Curiam*, In the principal Case the Plaintiff may maintain an Action of *Detinue* against *Joseph English*, upon the Original Delivery of the Gelding; and therefore this Promise, made by the Defendant, was to answer for the Act and Default of another, for which Reason the Verdict was set aside.

* P. 16

* 29 Car. 2. cap. 3.

Hutton *versus* Mansell. Pasch. 3 Annæ.

What shall be a sufficient Evidence of a Promise by Feme sole to marry.

CA S E, &c. by a *Feme Sole*, in which she declared *quod Cum* she had agreed and promised to marry the Defendant, he in Consideration thereof promised to marry her. Upon *Non Assumpsit* pleaded, the Cause was tried before *Holt*, Chief Justice, and the Promise of the Man was proved, but no actual Promise on the Woman's Side, yet he held there was sufficient Evidence to prove that the Woman likewise promised, because she carried her self as one consenting and approving the Promise of the Man.

Actions on the Case.

Savile versus Roberts. 10 Will. 3. at Guildhall, Coram Holt Chief Justice. 1 Ld. Raym. 374. S. C.

CASE for causing and maliciously procuring the Plaintiff to be indicted for a Riot. It was held by *Holt*, Chief Justice, 'Tis not sufficient, that the Plaintiff prove he was innocent, but he must prove express *Malice* in the Defendant; he likewise held, that this Action is not grounded upon the Conspiracy, but upon the Damage, and therefore the Plaintiff must prove his Damages, otherwise the Action will not lie: But in a Writ of Conspiracy 'tis otherwise, and where such a Writ is brought, if one is acquitted the other cannot be found guilty.

5 Mod. 394, 410.
1 Salk. 13. Case for causing the Plaintiff to be maliciously indicted, &c. he must prove the Malice and Damages.

* *Sheer versus Brown.* Trin. 2 Annæ. B. R. 2 Ld. Raym. 899. S. C. * P. 17

INDEBITATUS *Assumpsit*, in which the Plaintiff declared, that the Defendant being indebted to him for Goods sold in so much Money, in Consideration thereof *super se Assumpsit*, there was Judgment by Default, and upon a Writ of Error brought, it was objected, that the Declaration is ill, because it did not set forth, that *the Defendant* * *promised*, and it might be a Stranger: But *per Curiam*, it can never be intended, that a Stranger promised, or that the Plaintiff himself promised, and there is no other Person in this Record to promise, but only the Defendant; 'tis true, if there had been *two* or more Defendants, it might have been otherwise, because in such Case it would have been uncertain which of them had made the Promise; and *per Gould* Just. the Difference is also between a collateral Promise and a Promise by Operation of Law: For in the latter Case 'tis well, but not in the first. See 3 Cro. 913. Noy 50.

Indebitatus *Assumpsit*, and did not say, that the Defendant promised, held good.

* 1 Lev. 164. Raym. 123. Sid. 246.

College of Physicians *versus* Rose. Hill. 1703. B. R.

IN a Special Verdict, in an Action on the Case, the Jury found, that *Rose* the Defendant was an *Apothecary*, and sent for by a sick Person (of what Distemper *non constat*) that he came to the Patient, and being desired to send him something in order to his Cure, he accordingly sent him some *Bolus's*, and this being without any *Licence*, the Question was, whether it was practising as a Physician; and *per Curiam*, it is, for the making up and compounding Medicines is the Business of an Apothecary, but the Judging what is proper for the Cure, and Advising what to take for that Purpose, is the Business of a Physician; therefore let the Distemper be what it will, the Prescribing and advising what is fit for it, is the Business of a Physician, though without a Fee, but that rarely happens; so the Plaintiff had judgment, but it was reversed in the House of Peers.

6 Mod. 44. The prescribing what is fit for a Patient is practising Physiciansick.

Ashby versus White. Mich. 2 Annæ. 2 Ld. Raym. 938. S. C. 6 Mod. 45. S. C.

CASE against the Constables of *Ailesbury* in *Bucks*, for obstructing the Plaintiff to Vote, and for refusing to receive his Vote at the Election of *Burgesses* for that Borough, to serve in Parliament; upon Not guilty pleaded, the Plaintiff had a Verdict, and upon a Motion in Arrest of Judgment, three Judges * held, that this Action would not lie till the Parliament had decided, whether the Plaintiff had a *Right to Vote* as an Elector.

1 Salk. 19. Case will not lie for hindering the Plaintiff to vote at the Election for a Burgess to Parliament.
* P. 18

But *Holt* Ch. Just. was of a contrary Opinion, *ff.* That the Plaintiff had a Right to Vote, and that in Consequence thereof the Law gives him a Remedy, if he is obstructed, and that this Action is the proper Remedy.

By the *Common Law* of *England*, every Commoner hath a Right not to be subjected to Laws made without their Consent, and because such Consent cannot be given by every individual Man in Person, by Reason of Number and Confusion, therefore that Power is lodged in their Representatives, elected and chosen by them for that Purpose, who are either *Knights*, *Citizens*, or *Burgesses*.

That

Actions on the Case.

That the Election of *Knights of Shires* is by Freeholders, and this is a Right which they have in respect of their *Freeholds*, arising from and inseparably incident to such *Freeholds*; for before the Statute of *H. 7.* every Freeholder, though of never so small a Value, had a Right to Vote at such Elections; and though this was confined by that Statute to Freeholds of a certain Value yet 'tis still a Right, as it was at Common Law, and annexed to the Estate, and therefore 'tis a real Right or Franchise.

As to *Boroughs*, some are not *incorporate*, but are so by *Prescription*, and their Representatives are chosen by *Burgesses*, who vote *ratione Burgagii & ratione tenuræ*, and this like the Case of a Freeholder before-mentioned is a real Right annexed to the *Tenure in Burgage*.

In other *Boroughs* which are incorporated and subsist by Charter, the Right of Election is a personal Right granted to the Corporation, for the Use and Benefit of the Members thereof; for though in Point of *Prender* it vests in the Corporation only as an Inheritance; yet *quoad* the Exercise and Enjoyment, 'tis distributively the personal Right of every individual Member of the corporate Body, for they are Persons who are represented, and therefore they are to pay the Wages to the Person whom they choose; and if they refuse, 'tis to be levied upon the respective Members of the Corporation.

And as this is a personal Right, so it cannot be given but to a corporate Body; and though my * Lord *Hobart* would have it good in a Place incorporate, and this by Way of Ordinance, yet that is not Law, and all the other Judges were against him.

The Right of Citizens to vote for their Representatives is of the same Nature and built upon the same Foundation, and nowise different but in Point of *Emi-*nence, as Cities are more worthy and eminent than Boroughs.

This is a noble Franchise and Right, and therefore not without a Remedy where 'tis opposed, for Want of Remedy and Want of Right are Convertibles.

* 12 Rep. 120.

* P. 19

Harecourt versus Hastings. Pasch. 4 Will. 3.

No Advantage shall be taken to a Declaration upon a Plea in Abatement, the Defendant ought to demur.

IN an Action on the Case for Fees and Wages, the Defendant pleaded in Abatement, *Et petit judicium de Billa, & quod Billa prædicta cassetur*, for Incertainties in the Declaration, and insisted upon many Errors therein: *Sed per Curiam*, it shall not be allowed for the Defendant to take Advantage of any Errors in the Declaration upon a Plea in Abatement, but he ought to demur, for he was ruled to answer over.

1 Vent. 260, 269.

Case, &c. against a *Taylor*, in which the Plaintiff declared, that he (the Plaintiff) employed him to make a Coat, and that he made it *iam inepte & inartificialiter*, that it was of no Use to him; upon a Demurrer to this Declaration it was held naught, because *non constat*, wherein it was spoiled.

Case, in which the Plaintiff declared, that he being seised of such a Close, had a *Way, &c.* and that the Defendant *stopped it*, adjudged good, because Possession is a good Title against a Wrong-doer.

2 Vent. 78.

Case against a *Carrier*, and declares for four silver Cups & *uno poculo argenteo*, and not *uno alio poculo, &c.* adjudged good; for if it be *aliud*, the Damages shall be intended to be given for it; if it be *idem & non aliud*, then 'tis only Tautology, and in that Case the Damages may be rightly given.

Brooks versus Hayne.

Raym. 245. The Defendant pleaded the Statute 3 Jac. against an Action brought by an Attorney, that he had not given a Bill of Charges, and good.

THE Plaintiff, who was an Attorney, was employed by T. S. who made the Defendant his Executor, and died, and afterwards the Plaintiff brought an *Assumpsit* against this Executor for several Fees, and for so much Money laid out in prosecuting and defending several Suits at Law for the Testator; and sets forth, that he had demanded the Money of the Testator in his Lifetime, and of the

Addition.

the Executor since his Death, and that neither the one nor the other had paid it, &c. The Defendant pleaded the Statute * 3 Jac. and that the Plaintiff had not given the Testator, or to this Defendant, any Bill of Charges, according to that Statute, before the Action brought; and upon a Demurrer to this Plea, *per Curiam*, it was adjudged a good Plea. * Cap. 7.

* Addition.

* P. 20

AN Addition after the *alias dictus* is ill; as for Instance, where the Indictment was against *W. R. alias dictus W. R. de H.* for this is no Addition. 1 Bull. 296. 2 Cro. 183. Noy 32. 2 Leon 183.
For where the *Præcipe* was *Richardo Joyner, civi & pannario London, alias dictus Richardus Joyner de London Armiger*, adjudged, that without the *alias dictus*, there was no Addition of the Vill; and that if the Party is not sufficiently named in the first Part of the Writ, the *Alias* cannot Aid or help it, because 'tis only to make the Writ agree with the Deed, but is not material, for 'tis neither answerable, traversable, or issuable.

Et per Holt Chief Justice, If *W. R. of Wilts*, commit Felony at *Westminster*, he is always indicted by the Name of *W. R. de Westmonast.* and the Practice being always so, this may properly be said to be his Addition.

Debt against *W. R. de H. Yeoman, alias dictus W. R. de H.* Son and Heir of *R. R.* and so charges him as Heir; this was adjudged ill, because the Writ doth not name him *Heir* in the Premises, but in the *Alias dictus*.

Trespass against *W. R. de H. Chandler*, the Defendant pleaded in *Abatement*, Cro. Eliz. 334, that he was a Gentleman, and upon a Demurrer to this Plea it was adjudged ill, because he did not deny that he was a Chandler; and if a Gentleman exercise a Trade, he may be called by the Name of his Trade, though he is a Gentleman.

The Earl of Banbury *versus* Wood. 2 Ld. Raym. 987, S. C.

IN a *Homine replegiando*, the Defendant pleaded in *Abatement*, there was no Addition of Vill or Place of Abode in the Writ, &c. and upon a Demurrer to this Plea, he was ruled to answer over; for, *per Curiam*, an Addition is not necessary, because the *Pluries Replevin*, upon which the Court holds Plea, is not the original Writ, but the original Writ is *Vicontiel*, and no Process of Outlawry lies upon it, and therefore 'tis not within the Statute; also since there is no Addition in the first Writ, there must be none in the *Pluries*, for that must not vary but pursue the first Writ on which it was founded; and though the Statute of *H. 5.* says, there shall be an Addition in all original Writs where Exigent lies, yet that must be intended where Proceedings are upon the first Writ. 1 Salk. 5. Addition not necessary in a *Homine Replegiando*.

* Administration.

* P. 21

AD J U D G E D, that Administration of the Goods of a *Feme Covert* ought to be granted to the *Husband*, for he is the next and nearest Friend; the Care of the Funeral belongs to him, and he might have recovered or released whatever belonged to her. 2 Stra. 891, 1111, 1118. 1 Ld. Raym. 684. 685, 686, 1 Wilton 168.

But if the Wife was an Executrix to another, then, as to the Goods which she had in that Capacity, Administration must be granted to the next of Kin to the Testator. 4 Rep. 51. Jones 175.

Where there is a *Brother and Sister of the Half Blood*, Administration may be granted to the *Sister*, because she is in equal Degree of Kindred; but if the *Sister* is married, then it must be granted to the *Brother*, and not to her and her Husband. Allen 36. Stiles 45, 74.

Administration.

band, because in effect it makes the Husband Administrator, who is not of Kin to the Intestate, and if she die the Husband would still continue Administrator, and so might possess himself of the whole personal Estate; which is contrary to the * Statute.

Where an Executor *refuses* or *dies* before Probate, Administration shall be granted to the next of Kin of the Intestate *cum Testamento annex*, unless there is a *Residuary Legatee*, and then it must be granted to him.

The Husband made his Wife Executrix, and gave her the Residue of his *moveable Goods and Chattels*; now if the *Wife die before Probate*, Administration must be granted to the *next of Kin to the Husband*, because the whole *Residuum* was not given to the Wife; but if the Whole had been given to her (*viz.*) All his Debts, Goods and Chattels whatsoever, then Administration might be granted to the next of Kin of the Wife, because she was made a *Residuary Legatee* of the whole.

At Common Law the Ordinary might Repeal an Administration at Pleasure; but now since the *Statute 21 H. 8.* when once 'tis duly granted according to that Statute, it cannot be repealed, for his Power is then executed; but if 'tis not duly granted according to the Statute, as for Instance, if granted to a wrong Person, in such Case he may repeal it and grant it to another, for he hath not executed his Power. *Sed nota*, If the Administration is repealed for Want of Form in the Grant, in such Case the Ordinary must regrant it to the same Person, though there are others in equal Degree.

* Where an Administration is repealed, because it should be granted to another, in such Case all Acts of the first Administrator stand good; but if it is repealed because there is a lawful Executor, then all his Acts are void.

Where a Will is of Lands and Goods, the Court may repeal upon an Appeal; but where 'tis of Lands only they cannot, because there they had no Authority to prove, and by Consequence had no Authority to repeal.

Sir George Sand's Case.

SIR George Sands administered to his Son, and afterwards a Woman pretending to be his Wife, sued for a Repeal, but a Prohibition was granted, because the Ordinary had an Election to grant it either to the Father or Wife, and had executed his Power by granting it to the Father, *per Holt* Chief Justice.

But where a Feme Covert died intestate, and the next of Kin to her obtained Administration, and the Husband sued for a Repeal, a Prohibition was denied *per Holt* Chief Justice, because in this Case the Ordinary had no Power or Election to grant it to any Person but to the Husband; and this is not within the Statute of *H. 8.* but within the Statute of *Ed. 3.*

Upon this Issue the Defendant cannot give in Evidence a Judgment not satisfied, because 'tis an Administration of another Nature than he had pleaded.

Payment of Debts *pendente Brevis* is no Evidence upon this Issue, for the Plea is *Plene administravit* in the *præter-Tense*, and this Evidence proves an Administration only since the Purchase of the Writ, and therefore the Defendant must plead it Specially.

In a *Scire facias*, upon a Judgment against the Testator, if the Defendant plead *Plene administravit*, 'tis ill upon a special Demurrer, because by the Plea, the Defendant admits that Goods came to his Hands, and therefore he ought to shew how he administered, that it may appear it was not in paying of Debts of an *inferior Nature*, and this is in Favour of Judgments; but upon a general Demurrer such a Plea may be good, because the Defendant might have paid other Judgments, and so shall his Plea (which is confessed by the Demurrer) be intended.

Nota, The proper Plea in this Case is *Riens inter maines* at the Time of the Testator's Death.

* 21 H. 8.

Jones 125.

Repeal. Sid. 372, 179.
Jones 262. Raym. 43.
1 Mod. 230. 2 Ld.
Raym. 1216.

* P. 22

3 Cro. 460. Raym. 224.
Vent. 303.

Raym. 93. Sid. 179,
403. Where the Ordinary hath a Power and executes it, it shall not be repealed.

Of pleading Plene administravit.
1 Wilfon 4. Allen 42.
1 Salk. 316.

Allen 47. 3 Cro. 570.
contra.

Moor 838.

Admiralty.

* Slater *versus* May. Mich. 3 Annæ B. R. 2 Ld. Raym. 1071: * P. 23
S. C. 6 Mod. 304. S. C. 3 Danv. Abr. 351. pl. 4.

ADMINISTRATOR, *durante absentia* W. R. Executor, brought an Action of Debt upon a Bond, but did not aver where W. R. was absent, or that he was absent; *per Curiam*, 'tis reasonable the Ordinary should have Power to grant Administration in this Case, and such Administrator is accountable to the Executor, and we will intend him beyond Sea, but Absence should have been averred in this Case.

Action by an Administrator, during the Absence of the Executor, he must aver; the Executor is absent.

Admiralty.

Anonymous. Hill. 13 Will. 3. 1 Ld. Raym. 639. S. C.

UPON a Prohibition to a Suit in the Admiralty for Mariners Wages, it was held *per Holt*, Chief Justice, That if a Ship is * lost before she arrives to any Port of Delivery, the Seamen lose all their Wages, but if she is lost after she comes to a Port of Delivery, then they only lose their Wages from the last Port of Delivery: but if they run away, though after they come to a Port of Delivery, they lose all their Wages.

Seamen lose their Wages where the Ship is lost before she comes to a Port. * Sid. 129.

King *versus* Perry. Pasch. 1 Will. 3.

PER Holt, Chief Justice, an Obligation taken in the Admiralty to appear and sue there, is suable in that Court, for 'tis a Stipulation in Nature of Bail at Common Law: But where there were 13 Part Owners of a Ship, and one of them refused to let her go to Sea, whereupon a Stipulation was taken for the Share of the Party refusing, and afterwards the Ship went her Voyage, and this Stipulation being put in Suit in the Court, a Prohibition was granted, because the Building the Ship and the Charter Party were at Land.

Where an Obligation is suable in the Admiralty, and where not.

* Adjudged, that where a Master pawns the Ship at Sea, the Admiralty hath a Jurisdiction; and *nota*, he may pawn to relieve the Ship in Extremity, for he being constituted Master of the Ship, hath implicitly a Power to preserve it in Cases of Danger, but he cannot pawn it for his own Debt, because he has neither a Property or Power for that Purpose; and if the Admiralty should confirm an *Hypothecation* of that Nature, a Prohibition shall be granted.

Hob. 12. Moor 918. Where a Master may pawn a Ship, and where not. * P. 24

If a Man give Bond at Sea for a Debt contracted at Land, the Admiralty have no Jurisdiction, for one Thing must not only be done at Sea, but the whole must concur to give them Jurisdiction; so if a Debt is contracted at Sea, and a Bond given for that Debt at Land, so if there be a Contract at Land and a Breach at Sea, in these and the like Cases the Common Law shall be preferred.

Hob. 212

Advowson.

The King *versus* Bishop of Chester, & al'.

1 Lord Raym. 292.

IN a *Quare Impedit*, &c. it was held by Holt, Chief Justice, to which the Court agreed, that where an *Advowson* is appendant to a Manor, and the Owner mortgages the Manor in Fee, excepting the Advowson, that by this Means 'tis become *in Gross*; but if the Money be paid punctually at the Day, then 'tis become *appendant* again, and if 'tis paid after the Day, 'tis appendant in Reputation,

2 Salk. 560. 5 Mod. 297. Where an Advowson is in Gross, and where 'tis appendant again.

Advowson.

tation, and may pass by the Name of an Advowson appendant in a Grant or other Conveyance, though in reality the Appendency is destroyed; for if 'tis severed one Instant from the Manor, by the Act of the Party, 'tis then in Gros, and not appendant.

So where the Owner of a Manor, to which an Advowson was appendant, accepts a Fine of the Advowson, with a Grant and Render back of every second Turn, now for such Turn the Advowson is in Gros, but for other Turns the Appendency still continues: But if a Man levy a Fine of the Advowson, and accepts a Grant and Render of every other Turn, the Appendency is quite gone, because there was an Instant of Time in which it became severed.

So where there are two Coparceners of a Manor, to which an Advowson is appendant, and they make Partition of the Manor, without taking Notice of the Advowson, at every other Turn 'tis still appendant; but if there had been any express Exception of the Advowson, it would then be in Gros.

Reynolds *versus* Blake. Pasch. 9 Will. 3. in C. B.

Postea, Tit. Appertaining, S. C. Where an Advowson appendant to a Manor is become in Gros. 1 Ld. Raym. 197.

IN a *Quare Impedit*, it was the Opinion of the Court, That where there are two Coparceners of a Manor, to which an Advowson is appendant, and the whole Demesnes are allotted to one, and the Services to another, by this Means the Manor is destroyed, and the Advowson becomes in Gros; but if one of them die without Issue, so that the Demesnes descend to him who hath the Services, the manor is now revived, and the Advowson is appendant again, because this was a Severance by Act of Law. See 17 Ed. 3. 38. 12 H. 7. 5. 8 Rep. 79. 1 Inst. 122. Bro. Quare Imp. 118.

Alehouses.

Anonymous.

An Indictment will not lie where a Statute creates an Offence, and appoints the Punishment. Postea the King v. Edwards that it will not lie. 1 Salk. 45.

† Palm. 388. 2 Roll. Rep. 398. 2 Cro. 643.
* P. 26
‡ 1 Mod. 34.

THE Defendant was indicted for keeping a *Tippling House*, without Licence, *contra formam Statuti*: Upon Not guilty pleaded, he was found guilty; and it was insisted in Arrest of Judgment, that at Common Law any Person might keep an *Alehouse* in a fit and convenient Place for that Purpose, that this was a statutable Offence, and the Penalty by the Statute is, *that the Offender shall be committed by two Justices*, and a Recognizance taken of him, with two Sureties, not to sell Ale, &c. and that this being the Punishment by the Statute, for that Reason † an Indictment will not lie; and the Court * being of this Opinion, Judgment was staid, though an express ‡ Case was cited to the contrary.

Stephen Watson's Case. Mich. 13 Will 3.

§ 1 Salk. 45.

THE same Point came in Question again in *Stephen Watson's Case*, which is imperfectly reported in § 1 Salk. by the Name of *Stevens versus Watkins*, The Case was thus:

Steven Watkins was indicted at the Quarter-Sessions, for that he, on the first Day of *October*, Anno 10 Will. 3. and at divers other Days and Times at B. &c. without any Licence from two Justices of the Peace, did keep an Alehouse, and sold Ale and Beer there *contra pacem & contra formam Statuti*; upon a Demurrer to this Indictment it was insisted,

1. That an Indictment would not lie in this Case.
2. That admitting it would lie, yet not at the Sessions.
3. But admitting that it would lie, and at the Sessions, yet this Indictment is ill in Form.

I

First,

Alehouses.

First, This Indictment must be either upon the Statute * 5 & 6 Ed. 6. or * Cap. 25. upon the Statute † 3 Car. 1. and both these Statutes prescribe another Method † Cap. 3. of punishing this Offence, which was made so by one or both of them, and that † Method and no other must be followed, and if so, then an *Indictment* will † 2 Cro. 643. Castle's not lie. Case. 1 Roll. Rep 390.

(2. *Point*.) But admitting it will lie, yet not at the Sessions; for this is not an Indictment upon the Statute 4 Jac. 1 cap. 4. for selling Ale by the Barrel without Licence, for in that Case, by the very Words of the Statute, an Indictment will lie at the Sessions; but this is an Indictment upon one of the Statutes before mentioned, and neither of them give the Sessions any Power in this Case, and they have no Power, but what is expressly given them by Statute.

(3. *Point*.) But this Indictment is naught in Form, for the Caption is, that it was presented by the Oath of twelve Men sworn and charged, without saying, † *ad iunc & ibidem jurat' & onerat*, and thereupon it was adjourned; but afterwards, † 1 Vent 60. in *Mich. 13 Will. 3.* it was adjudged, that this Indictment would not lie, because it was a new Offence created by Statute, and a particular Method of punishing the Offender was appointed by the Statute, which should be followed, and no other.

* The King *versus* Randall.

* P. 27

THERE is a short Note of this Case in 2 Salk. but the Case was as followeth, (*viz.*) two Orders were removed by *Certiorari* in *B. R.* which Orders were made at the Sessions in *Middlesex*, the first whereof recites, that whereas *R. Randall* had lately taken a House at *Hogsdon*, designing to sell Ale and Beer there; and whereas the House had never been inhabited by other Persons than Merchants and Persons of Quality, and there were Alehouses enough in *Hogsdon* already, therefore 'tis ordered, that no Licence be granted to any House there, wherein Ale was not formerly sold; and that no Licence should be given to *Randall*; the other recites, that whereas a Licence was surreptitiously obtained by *Randall* from Two Justices, to sell Ale there, &c. that yet he should be suppressed, &c. from drawing Ale there, &c. and now it was moved to quash these Orders, because by the Statute 5 & 6 Ed. 6. the Quarter-Sessions cannot controul the Authority of two Justices in this Matter; *Et per Holt Ch. Just.* This Difference hath been taken, (*viz.*) where an Authority is given to two Justices to do a Thing, and from which there lies no Appeal, there it may be commenced and done in the Sessions; but if an Appeal is given, then the Sessions hath not an original Jurisdiction, it must not be begun there; as for Instance *per 18 Eliz.* and 43 *Eliz.* till the Statute 3 Car. 1. But here the Question is, whether the Sessions can suppress an Alehouse licensed by two Justices of the Peace, and adjudged they could not, except 'tis for Disorders committed, and thereupon these Orders were quashed.

The King *versus* Edwards.

THE Question * whether an *Indictment* would lie for selling Ale without a Licence, was again stirred, notwithstanding the Resolution in *Stephen Watkins's* Case before-mentioned; and two Judges were of Opinion that it would not lie; but *per Holt Ch. Just.* an Indictment is more beneficial for the Subject, because 'tis a summary Way of Proceeding, and therefore it seems reasonable that it should lie in this Case, notwithstanding 'tis an Offence created by the Statute, and a particular Punishment thereby directed; and so it hath been adjudged in a parallel Case; as for * Instance, 'tis prohibited by the Statute 22 Car. 2. to * 4 Mod. 144. travel with a Waggon drawn with more than five Horses at length; this is a new Law, and 'tis a new Offence to transgress it; but yet an Indictment will lie against the Offender * though a particular Punishment is directed by that very Statute which created the Offence.

Alien. See Discent per totam. See Trial 2.

Progers *versus* Arthur. Pasch. 5 Will. 3. B. R. Rot. 531.

When a Traverse makes
Issue too strait. 2 Stra.
1082. 1 Salk. 46.
Fost. 186.

Jones 261.

INDEBITATUS *Assumpsit*, the Defendant pleaded, that the Plaintiff was an *Alien Enemy*, born at *Roan* in *France*, under the Allegiance of, &c. The Plaintiff replied, that he was born at *Hamburgb*, under the Allegiance of the *Emperor, a Friend of the King, &c.* and *traversed*, that he was born at *Roan* in *France, &c.* to which Replication the Defendant demurred; and had Judgment, because by the *Traverse* *Roan* is Parcel of the Issue, which is very immaterial, it being too strait; and instead thereof the Plaintiff should have traversed, that he was born under the Allegiance of the *French King: Nota tamen*, in a Case between *Grodeck* and *Briggs*, which was Debt for an Escape, the Defendant pleaded that the Plaintiff was an *Alien Enemy*, born at *Roan* in *France*, under the Allegiance of the *French King, &c.* and the Plaintiff replied, that he was a natural Subject, born at *Westminster* in the County of *Middlesex*; and traversed that he was born in *France*; and upon Demurrer the Court held this to be an immaterial Traverse, for the Plaintiff should have rested, and tendered an Issue upon his being born at *Westminster*.

1 Vent. 417.

* P. 29

Hob. 148. 1 And. 20.
Goldf. 29. 1 Leon. 47.
4 Leon. 82. Sid. 417.

* 1 Sand. 7. Sid. 308.

The Capacity of an Alien may be considered, either in Reference to Inheritances and to Freeholds, or to Goods and Chattels, as to *Inheritances, &c.* an Alien may purchase by his own Account or Contract, tho' he cannot retain against the King, but he cannot take a Freehold by Action in Law, therefore he cannot be a Tenant by the Courtesy; nor an Alien Woman be Tenant in Dower; for the Law doth nothing in vain, therefore it will * not give him or her a Freehold in the Cases before-mentioned, because they cannot keep it.

Chattels are either *real* or *personal*, now an Alien is not capable of a *Chattel real*; as for Instance of a *Lease of Lands*, but an Alien Merchant may take a Lease of a House to dwell in, as incident to Trade and Commerce, but he is not capable of *Chattels personal*.

At Common Law, a Lease made to an Alien Artificer, either of a *House* or *Shop*, was good between the Parties, but forfeitable to the King; but now, if a * *Shop* is let to an *Alien Artificer*, the Lease is void by the Statute 32 H. 8. and if the Lessor brings an Action of Debt for Rent, the Lessee may plead this Statute in Bar to the Action; but if a House or Shop is let to an *Alien Gentleman*, the Lease is not void within that Statute, neither is it pleadable in Bar to an Action.

Amendment. See Variance.

* Cap. 11.

AMendments are usually made in *Affirmance of Judgments*, and seldom or never to reverse or destroy them:

By the Statute of * *Marlbridge*, 'tis enacted, that *De cætero fines non capiantur pro pulchre placitando, (i. e.)* for Leave to amend vitious and bad Pleading, &c. from which it may be observed, that there were Amendments at Common Law, but then the Party was to pay a Fine for Leave to amend, like a Fine *pro licentia concordandi*; for he was to be amerced for ill Pleading which Amercement was due to the King; and that being now taken away by this Statute, it seems reasonable that the Party should pay *Costs* upon an Amendment.

There are but two Statutes of Amendments (*viz.*) 14 Ed. 3. and 8 H. 6. the one extends to Process out of the *Roll, (i. e.)* to Writs which issue out of the Record, and not to Proceedings on the *Roll* it self; and this last Statute hath always been construed in Imitation of the first, the Intent of it being to amend in

Amendment.

in Matters precedent to the Judgment, and to support the Judgment itself, and to avoid Writs of Error.

The Statute 16 & 17 Car. 2. is in the Nature of a Statute of *Jeofailes*; it extends only to superior Courts, and to the Courts of Counties Palatine, and that only after Verdict, unless in some particular Cases; by this Statute all Defects are amendable after Verdict, which do not alter the Merits of the Cause, nor the Nature of the Trial and Issue. * P. 30

Therefore where the Matter of the Suit is not actionable, the Judgment shall be arrested; so likewise where there is a Cause of Suit, but the Plaintiff hath took a wrong Remedy; as for Instance, if he bring an Action on the Case for Words, which are not actionable; if he bring an Action of Debt upon a Bond before it is due, or Debt for Rent before it is in Arrear; so if he bring *Covenant*, and doth not assign a sufficient Breach, or *Assumpsit*, and doth not shew a sufficient Consideration, these are not helped by the Verdict.

At Common Law *original Writs* were not amendable, because coming out of another Court, they are not subject to be corrected by B. R. but in the Case of the King, they might be amended in Chancery.

But now by the Statute 8 H. 6. the Court may amend any Fault in an original or judicial Writ, if 'tis the Misprision of the Clerk.

Thus if the Curfitor hath Instructions to make out a Writ against *W. R. genitum*, and instead of that he Names him *Militem*, this Mistake is amendable, for it must be imputed to his Negligence or Oversight: But if he is named *Genitus* in the Original, when it should be *Miles*, and the Curfitor had no such Direction, this cannot be amended, because 'tis not his Fault, but the neglect of true Information by the Party himself. 8 Rep. 156. Blackmore's Case. Hob. 129.

If an Original is *Præcipe quod solvit*, instead of *Præcipe quod reddat*, or *Hos breve* for *Hoc breve*, it is not amendable by the Statute 8 H. 6. because this must be imputed to the ignorance of the Curfitor; it makes the Writ without due Form which is required by Law, for *forma dat esse rei*, and prevents Confusion. 8 Rep. 159.

But by the later Authorities, *false Latin* is amendable, as in Waste, if the Writ is * *destruio* instead of *destruio*, so *Hos breve* for *Hoc breve*, or *Debet* for *Debeant*. 2 Saund. 39. 2 Vent. 171. * 2 Vent. 173. 4 Rep. 44.

So Debt in the *Debet* when it should be in the *Detinet*, per Stat. 16 Car. 2. amendable, and Want of Pledges, in a Suit by Original, because 'tis only Matter of Form, by which neither the Right of the Cause or the Nature of the Trial is altered; the like where the Suit is by Bill. Sid. 379, 421.

The Omission of *Vi & Armis & contra pacem*, was formerly held fatal, even after a Verdict, for it was held to be Matter of substance, because it brings a Fine to the King, but now 'tis amendable by the last Statute; so is the Omission of a *profert hic in Curia* after a Verdict, but not upon a Demurrer. * 2 Saund. 308, 402.

And by the same Statute an Omission of a *Capiatur* or *Misericordia* shall be amended, and so 'tis if a *Capiatur* be entered * instead of a *Misericordia*; so where an Action is brought by *Thomas*, and the Judgment was *Quod Johannes recuperet*, this is amendable, for the Mistake is only of the Name, which before was right in the Record; and by the Statute, no Fault shall impede the Judgment which doth not effect the Merits of the Cause, or the Right of the Party. Sid. 70, 143. * P. 31

Greenwood *versus* Piggott. Trin. 7 Will. 3. B. R.

TR E S P A S S for an Assault and Battery; the Defendant pleaded *Son assault demesne*, the Plaintiff replies, *De son tort demesne absque tali causa & de hoc ponit se super patriam & predictis* * *Edwardus* (which was the Plaintiff's Name) *similiter*, when it should have been the Defendant's Name; the Original, the Issue and the *Nisi prius Roll*, had both this Mistake, but the *Plea Roll* was right. Where the *Nisi prius Roll* shall be amended by the *Plea Roll*. * 3 Cro. 435. 8 Rep. 161. 2 Cro. 444, 587, 157, 627.

Adjudged, that it should be amended.

Amerciaments and Fines.

Sanders *versus* Lenoir. Mich. 1 Annæ B. R.

A Record shall not be amended by the Draught below.

IN a Writ of Error, upon a Judgment in the Court at *Northampton*, the Record removed being *Præceptum fuit*, instead of *præceptum est*, in the *Venire*, and *Messes* instead of *Mifs*; the Draught below was Right, it being drawn by the Clerk and perused by Counsel; and now upon a Motion to amend the Record by the Draught (which the Clerk swore to be Right below) it was denied, because it was no more than a private Paper in their own Custody, of which this Court could not take any Notice; and if this was done by Contrivance (as alleged) the Defendant might bring his Action.

Anonymous. Pasch. 7 Will. 3.

Whilst all is in Paper 'tis not within the Statutes of Amendments.

RULED, That whilst the Declaration is in *Paper*, the Court may give leave to amend any Thing in it at Pleasure, because in such Case 'tis not within the Statutes of *Amendments*; but when once it comes in Parchment the Court can give Leave to amend no farther than is allowed by the Statute, for 'tis then a Record, and ought not to be dashed or obliterated.

Nota, After a Demurrer only given, but not joined, the Party cannot amend without Leave of the Court.

* P. 32

* Where the *Roll* varies from the *Original*, the *Roll* might be amended at *Common Law* at any Time; for the *Original* is a Record of itself, and the Entry of it on the *Roll* is only *Ex abundantii*, though the Usage is to enter it.

3 Rep. 157.

So during the Term, the Court might amend any Mistake in the *Roll* at *Common Law*, for the *Roll* is only the Remembrance of the Court during the Term.

But at the *Common Law* after the Term, the Court could not amend any Fault in the *Roll*, for then the Record is not in the Breast of the Court, but in the *Roll* itself.

Williams *versus* Hoskins. Mich. 3 Annæ B. R.

1 Salk. 52. By the Name of Bucksome v. Hoskins. Mod. Cases, 263, 310. See Cro. El. 760. Cro. Car. 162. 1 Roll. 197, 797. 2 Cro. 372. which per Holt, Ch. Just. is a hard Strain. Sid. 7. 12.

TH E Plaintiff obtained Judgment in Ejectment for *two Houses*, and brought a *Scire facias* on that Judgment, to shew Cause why he should not have Execution of *one House*; the Defendant pleaded *Nul tiel Record*, and the Plaintiff perceiving the Fault, moved to amend it. *Sed per Curiam*, This *Scire facias* is a good Writ, there is no fault in it to amend, and the Court will not alter it to fit it for the Plaintiff's Purpose in this Judgment, when 'tis probable there may be another Judgment in Ejectment for one House, and the Defendant having taken Advantage of it, it shall not be amended to falsify his Plea,

Amerciaments and Fines.

AMongst the Ancients all Punishments were *Pecuniary*, from whence the *Latines* properly say, *Solvere pœnas*; but in Process of Time this Sort of Punishment became contemptible, and then for some Crimes Death ensued.

Bracton 129.

All *Amerciaments and Fines* belong to the King, thus *Fines upon Original Writs* and *Fines pro licentia concordandi*, and the Reason is, because the Courts of Justice are supported at his Charge; and wherever the Law puts the King to any Charge, * for the Support and Protection of the People, it provides Money for that Purpose, and this is called *Veſtigal Judiciorum*.

* P. 33

8 Rep. 40.

An *Amerciament* is ordered by the Court, but *assessed by the Jury*, and a *Fine* is not only ordered, but assessed by the Court; and as for these *Amerciaments*, which are ordered and assessed by the Court, upon Officers, who are in Contempt,

Ancient Demesne

tempt, or in Default of their Duty, these seem to be rather *Fines* than *Amerciaments*, though they are commonly so called; and yet it hath been held, that where a *Pecuniary Penalty* is assessed by the Court upon an Officer, 'tis properly an *Amerciament*; but when on a Stranger, 'tis a *Fine*.

Where the Defendant is found guilty of a Misdemeanor upon Indictment, and Fined, he cannot move to mitigate the Fine unless he appear in Person; but he may be *fined* though absent. 1 Vent. 209, 270.

Wherever a Fine and *Ransom* is mentioned in a Statute, the Word *Ransom* imports a Sum treble to the *Fine*, though my Lord Coke in his *Littleton* tells us 'tis the same Thing. Dyer 232. a. 1 Inst. 127.

Where a Statute imposes a *Fine* at the Will and *Pleasure of the King*, that must be intended, of his *Judges*, for 'tis by them the Fine is imposed.

Where a Statute imposes a Fine certain upon any Conviction, the Court cannot mitigate it; but if the Party come in before the Conviction and submits himself to the Court, they may assess a less Fine, for he is not convicted, and perhaps never might. 4 Inst. 71.

But though the Fine is certain, yet the *Court of Exchequer* may mitigate it, because 'tis a Court of Equity, and they have a Privy Seal for it. 1 Roll. Rep. 194. Wray's Case.

At a Court-Leet the Steward told *W. R.* he was a *Resiant*, who replied, he lied, thereupon the Steward fined him 20*l.* and adjudged good without a Prescription so to do, and Debt lies for this Fine. But if he fine the Jury for a Contempt, he must fine them severally, for the Contempt of one is not the Contempt of the other. Cro. Eliz. 581. 1 Roll. Rep. 32.

* Ancient Demesne.

* P. 34

Hunt *versus* Browne. Hill. 1 Annæ.

THIS Case is put at large in 1 *Lutw.* and in arguing it *Holt*, Ch. Just. held, That a *Recovery in Ancient Demesne* with double Voucher, is a Bar to an Estate tail, as it is in the Court of Common Pleas, for a good Foundation of such a Custom must be supposed, and 'tis that which hath given this Conveyance such Effect and Operation; so likewise a Recovery by Default in that Court is a *Discontinuance*, as 'tis in the Common Pleas, and a Fine likewise is a *Discontinuance*, but no Bar, and as to that Point 'tis not material, whether the Court is a Court of Record or not; for if the Action sued there will recover a Freehold, the Discontinuance is a necessary Effect of such a *Recovery*, for every Recovery recovereth a Fee-simple, and every Recovery of a Fee-simple works a *Discontinuance*, and therefore a Fine levied in this Court (if 'tis a Fine) must be of the same Consequence and Effect as other Fines are, and certainly a *Fine* may be levied of *Lands in Ancient Demesne*, in the Court of the Lord of the Manor, upon a Writ of *Right Close*, for 'tis agreeable to the Power of that Court in other Instances; as for Example, that Court may try the *Mise* joined upon a Writ of Right, which hath the same Effect upon a Non-claim as a Fine hath; and the Tenants of such Lands would be under this great Disadvantage, that no Fine at all would be levied of their Lands, if it might not be levied in that Court, but their Privileges can never be intended to be to their Disadvantage: To all which the Court agreed. 1 Salk. 57, 244, 339. 1 Lutw. Where a Recovery, suffered in a Court of Antient Demesne with double Voucher, is a good Bar to an Estate Tail. Comyns 93.

Kite *versus* Laury. Hill. 7 Will. 3. B. R.

IN *Ejectment* the Defendant pleaded, that the *Manor of Bray* is *Ancient Demesne*, and that the Lands in Question are held of the said Manor, and pleadable by *Writ of Right Close* in the Court of the Lord of the Manor. The Plaintiff replied, that the Lands were in the Parish of * *Bray*, and were *Frank-Fee* and pleadable at Common Law, and traversed, that they were *pleadable in the Court* of *Salk. 56.* By the Name of *Barker v. Wich.* 'Tis the Tenure that is traversable, and not the being pleadable in the Lord's Court. 2 Burrow 1047, 1048.

Ancient Demesne.

of the Manor; and upon a Demurrer to this Replication it was argued, that the Precedents were otherwise, for 'tis the *Tenure*, and not its being pleadable in the Court of the Manor, which is traversable; for that is but a Consequence of the *Tenure*, to which the Court inclined, saying, that where *Ancient Demesne* is pleaded, in such Case the Party (to make a full Defence) must either take Issue upon it, or traverse the *Tenure* of the Manor, or that there was a Fine levied, or Common Recovery suffered, and so rely upon the Estoppel, and pray Judgment, whether he shall answer to it as *Ancient Demesne*, contrary to such Fine or Recovery: And *Nota*, That where *Ancient Demesne* is pleaded, the Defendant must alledge, that the Lands are held of such Manor which is *Ancient Demesne*, and not that they are Parcel of such a Manor which is *Ancient Demesne*.

Zouch *versus* Thompson. Mich. 9 Will. 3. C. B. 1 Ld. Raym.
177. S. C.

² Wilfon 17.

³ Lev. 417, 419. Where
^a Writ of Deceit lies a-
gainst the Cognisee as well
as against the Cognisor of
^a Fine.

A Fine being levied of Lands in *Ancient Demesne*, the Lord brought a *Writ of Disceit* against the Tertenant, and against the Heirs of the Cognisee and the Heir of the Cognisor, seven Years after the Fine had been levied; and declared generally, that he was Lord of the Manor at the Time of the Fine levied, and yet is Lord thereof, without shewing any Estate specially; and in this Case these Points were resolved, (1.) That a *Writ of Deceit* lies against the Cognisee himself as well as against the Cognisor, because he is a Party to that Fine which works a Wrong and Prejudice to the Lord of the Manor. (2.) That this Writ lies against the *Heir of the Cognisor or Cognisee* because the Fine worked a real Deceit and not a personal Tort only, which dies with the Person of the *Tort-fessor*, as in *non Summons*, for it being a Wrong by which the Lord is disinherited and barred of his Fines and other Duties arising from the Courts of his Manor, it shall by no Means die with the Person of the Wrong-doer. (3.) That the Lord need not shew any Estate in particular, 'tis sufficient that he was *Dominus pro tempore*, and if his Estate should determine by Alienation, the Tenant ought to plead it *Puis darrein Continuance*. (4.) The five Years Non-claim is not material, because a Fine may establish the Right of another, but can never establish its own Defects. (5.) This Fine is *coram non iudice*, and merely void: See *Br. Fines* 47. *Br. Descent* 14. 21 *Ed.* 3. 20. 7 *H.* 4. 28. 1 *Leon.* 290. *Herne's Pleader* 93.

*. P 36

* Savery *versus* Smith.

² Lutw. The Plaintiff in
her Replication pleaded
Ancient Demesne needs
not set forth what Title.

IN Replevin for taking his Cattle, &c. The Defendant made Conufance for Toll in *Highbworth* Market, demanded of the Plaintiff, which he refused to pay, and thereupon he justified the Taking the Cattle; the Plaintiff replied, that she is *Tenant of the Manor of HANNINGDON in WILTSHIRE*, which is, *Ancient Demesne*, and that Tenants of Lands in *Ancient Demesne* are quit of Toll in all Places, &c. and upon a Demurrer to this Replication it was insisted for the Defendant, that the Plaintiff had not made a good Title to this *Privilege*, because she only set forth, that she is *Tenant of the Manor* which is *Ancient Demesne*, when she should have declared, that she is *seised in Fee* of such Lands, &c. which she held of *T. F.* as of his Manor of *Hanningdon*, which is *Ancient Demesne*: But *per Curiam*, 'tis not necessary for such Tenants to set forth what Estates they have, either in Fee simple or otherwise; 'tis sufficient for them to alledge, that *Homines & Tenentes de antiquo Dominico* ought to be discharged of Toll, &c. then it was objected, that the Plaintiff had laid this *Privilege* too general, for it was to be discharged of Toll generally, and in all Places, &c. when by Law Tenants in *Ancient Demesne* are not discharged of Toll, but only of such Things which arise on their own Lands, and which are for the Support and Ease of them and their Families; and the Reason of this is, because these Lands were formerly in the Possession of King *Edward the Confessor*, or King *William, called the Conqueror*; and therefore in the *Domesday-Book*, which was made in the 20th Year of his Reign, they are called, *Terræ Regis Edwardi*, and those in

Appeal.

in the Possession of King *William* are called *Terræ Regis*; and when any of these Lands were aliened from the Crown, the Tenants were obliged by their Tenure to manure the King's *Demesnes*, and therefore to encourage them in that Labour, they had this Privilege to be discharged of Toll of all Things which did arise or grow on their own Lands; but when they turn Merchants and Traders in other Things, they are not within the Reason of this Privilege; *sed per Curiam*, 1 Leon. 231. Cro. Eliz. to be quit of Toll in Places, shall be intended of such Things in all Places where 10. Ward versus Knight. he is Tenant.

* Appeal. See Restitution.

* P. 37

BY the Common Law a Female might have an Appeal as Heir to any An- * Cap. 34.
cestor as well as the Male; but now, by * *Magna Charta*, 'tis enacted,
that *nullus capiatur vel imprisonetur propter appellam fœminæ de morte alterius quam viri sui*.

And where a Woman brings an Appeal of the Death of her Husband, *ne unques accouple* in loyal Matrimony is a good Plea; so is a second Marriage, but an Elopement is not.

It lies at any Time within the Year and Day, to be accounted from the Death, 2 Inst. 318. 4 Rep. 42.
and not from the Stroke given; but an Appeal of Robbery may be brought after 4 Leon. 16.
the Year. Mich. 13 Car. *James Gower's Case*.

In an Appeal of Felony, a Nonsuit after Appearance is peremptory, and so it is 1 Inst. 139.
in an Appeal of *Maibem*, because the Writ is *felonice maibemavit*.

In an Appeal of Murder, the Defendant cannot justify *se defendendo*, but must 2 Inst. 316.
plead not guilty, and the Jury shall find the Special Matter; but in Cases not capital, as *Mayhem*, &c. he may justify *se defendendo*, but not in Defence of his Goods; for if he plead Not guilty, he cannot give *se defendendo* in Evidence.

In an Appeal, the Defendant having pleaded to Issue, may nevertheless waive Cro. Eliz. 196. *Hanc's Case*.
it, and demur upon the Count; for the Trial would be in vain if that fail;
and yet if the Demurrer be adjudged against the Defendant, the Judgment is only to answer over.

The Father *attainted of Felony*, was slain by one who had no Authority, the 7 Rep. 13. Sid. 196.
Wife shall bring the Appeal and not the Heir, for *hæres est nomen juris*, but
Uxor est nomen naturæ, and the Attainder of the Husband cannot extinguish that
natural Relation which is between Man and Wife, tho' it may that civil Relation
which is between Ancestor and Heir.

In an Appeal against four by Writ, the Defendants appeared at the Return, Cro. Eliz. 605. Hol-
and the Plaintiff offered to declare against them as in Custody: *Sed per Curiam*, land's Case.
they are not in Custody upon their Appearance, but there must be a *Committitur*
or *Bail filed*, upon which the Plaintiff was called, and Nonsuit.

An Infant brought an Appeal *per Guardianum*, and at the Day it was prayed, Noy 88. Latch 175.
that the Guardian might not be demanded for three or four Days being sick; but
per Curiam, it was denied, and so the Infant lost his Appeal.

* Prince versus Bawd. Mich. 5 Will. 3.

* P. 38

APPEAL of Murder, the Defendant pleaded *Auterfoits* convict for the
same Offence, and the Oyer of the Record and Conviction being
demanded, it was moved, that it might be entered * *in hæc verba: Et per* * Dyer 284.
Curiam, Oyer of the Record was granted, but it shall not be entered *in hæc verba*,
because it is a Record of the same Court; now, upon the Oyer, several Variances
appeared, so that it was objected, that the Defendant had failed of his Record,
upon which it was prayed to amend, being all in Paper; but on the other Side it was
objected, that *Auterfoits* convict was only pleaded for Delay, for 'tis no Bar with-
in the Statute 3 H. 7. But it was ruled, that before that Statute *Auterfoits* con-
vict

Appeal.

viſt or acquit were good Pleas in Bar of an *Appeal*, and that the Statute has only the two Pleas of *Auterfoits acquit or attain*, but that *Auterfoits convict* remains as at Common Law.

Hoile *verſus* Pitt.

⁴ Mod. 158. Amendment not allowed in criminal Caſes.

IN an *Appeal of Murder*, the Defendant pleaded a Conviction for Manſlaughter at the *ſeſſions* held in the *Old Bailey*, and that he had his Clergy; and before any Demurrer to this Plea, or Iſſue joined, there being a Fault apprehended, becauſe the Defendant did not ſet forth by *what Authority the Court at the Old Bailey* was held; thereupon the Defendant, by his Council, moved to amend his Plea: *Sed per Holt* Ch. Juſt. the Appellant himſelf cannot amend, and the Reason is the ſame why the Appellee ſhould not; for in this Caſe, by an Amendment, a new Roll is made, whereas in other Caſes Amendments are made when all is in Paper; and no Statutes extend to Amendments in Appeals in criminal Caſes.

Bauſon *verſus* Offley.

³ Mod. 121. Where the Wound was given in one County and the Death was in another County.

* P. 39

* Cap. 24.

IN an Appeal brought by the Wife for the Murder of her Huſband, ſhe declared, that on ſuch a Day and Year one *Offley* did Assault and Wound her Huſband in the County of *H.* of which Wound he afterwards, on ſuch a Day, died at *R.* in the County of *C.* and that one *Lippon* was aſſiſting the ſaid *Offley*, &c. The Cauſe being tried, the Jury found that *Lippon* gave the Wound, and that *Offley* was aſſiſting him; and now, upon a Motion in Arreſt of Judgment it was inſiſted for the Appellee, * that the Count and the Verdict in Appeals muſt be certain, otherwiſe no Judgment could be given againſt the Appellee; but here the Verdict found another Perſon gave the Wound, and not he againſt whom the Appellant had declared. *Sed per Holt*, Ch. Juſt. This is an Exception which might as well be made to an *Indictment*, as to a Count in an Appeal, for the one ought to be as certain as the other; but in this Caſe 'tis certain enough, for he who gave the Stroke, and he who was aſſiſting in it, are both equally guilty: Then it was objected, that the Cauſe was tried in a wrong County; for it was by a Jury in *C.* when it ought to be by a Jury of both Counties, ſince the Wound was in one County, and the Death in another. *Sed per Curiam*, by the Statute * 2 & 3 *Ed.* 6. 'tis enacted, that an Indictment found by a Jury of that County where the Death happens, ſhall be as effectual in Law as if the Wound which was the Cauſe of ſuch Death, had been given in the ſame County.

Culliford's Caſe.

¹ Salk. 382. S. C. 6
Mod. 219.
² Stra. 855, 858.

THE Defendant being indicted for Murder, was found guilty of Manſlaughter at the Aſſiſes, and an Appeal was immediately brought; the Judge gave the Appellee Time to plead till next Aſſiſes, but in the Time the Appellant brought an *Habeas Corpus & Certiorari*, to remove both the Body and the Record into *B. R.* and afterwards the Parties agreed, and the Appellee being bailed, he appeared in Court upon his Recogniſance and produced a Release from the Appellant, and thereupon moved to be diſcharged, there being a Couſel from the Appellant, and conſenting to it. *Sed Holt*, Chief Juſtice. The Court will be poſſeſſed of the Record before he ſhall be diſcharged; therefore let the *Habeas Corpus & Certiorari* be returned, and the Return filed, then the Appellee muſt be arraigned, and afterwards he may plead this Release; but if the Appellant is not ready at the Return of the *Certiorari* to arraign his Appeal, or doth not appear in Perſon, the Appellee may have a *Scire facias* to compel him, and if he doth not come in upon the Return of ſuch *Scire facias*, he ſhall be demanded and Nonſuit: But the Appellee is not yet to be diſcharged, becauſe there is a Record againſt him in Court, and therefore he muſt be arraigned upon the Indictment, and then he may plead *Auterfoits acquit*, &c.

* Appertaining.

* P. 40

LANDS may be said to be appurtenant to a *House*, either in the King's Case, or in the Case of a *Common Person*, when they have been let and possessed together a convenient Time. Dyer 362. Co. Ent. 384. Cro. Car. 169.

A *Way* cannot be appurtenant or appendant, as a *Common* may, because 'tis not an Interest, but an Easement. Yelv. 159.

The Thing which and to which 'tis appurtenant must agree in Nature and Quality; as *Turbary* may be appurtenant to a *House*, but not to *Lands*, a *Leet* to a *Manor*, but not to a *Church*, a *Seat* in a *Church* to a *House*; but not to *Land*; so an *Advowson* shall not be appendant to the *Services*, but to the *Demesnes* of a *Manor*, for the *Demesnes* are of a perpetual Duration, but the *Services* are not. 1 Inst. 121.

A *Vicarage* may be appendant to a *Manor*, because 'tis derived out of the *Rectory* of *Common Right*; and yet by a *Grant* it may be annexed to a *Manor*.

W. R. sells a *Mill cum pertinentiis*, the Jury find a *Kiln* was occupied with the *Mill* for many Years. *Sed per Curiam*, that *Kiln* shall not pass by those Words, for it might be a *Lime-Kiln*, and may have no Relation to the *Mill*; but if the Jury had found it to be a *Malt-kiln*, it might be otherwise. Sid. 24, 211. 1 Lev. 31.

Rex versus Bishop of Chester.

AN *Advowson* is appendant to a *Manor*, the Owner mortgages the *Manor* in *Antea Title*, *Advowson*, *Fee*, except the *Advowson*, 'tis now become in *Gross*, but if the Money is paid on the Day, 'tis become appendant again, and if 'tis paid after the Day, the *Advowson* is appendant in Reputation; so that it may pass in a *Grant* by the Name of an *Advowson* appendant, though *per Holt* Ch. Just. in Truth the Appendency is destroyed. S. C.

Reynalds versus Blake. Pasch. 9 Will. 3.

TWO *Coparceners* of a *Manor*; the *Demesnes* are allotted to one, and the *Services* to the other, the *Manor* is gone and the *Advowson* comes in *Gross*; but if one die without Issue, and the *Manor* descend to her who had the *Services*, * *per Holt*, Chief Justice, the *Manor* is revived again, and the *Advowson* becomes appendant as it was before, for the Severance was by Act in Law. * P. 41

Apprentices. See Indictment 17, 21. Travers 8. And Burn's Just. Title Apprentices.

Punting's Case.

AN Order to discharge an Apprentice was quashed, because it was to the Trade of a *Tallow Chandler*, which is a Trade not mentioned in the Statute; besides it was under the Hands and Seals of three Justices, when that Statute requires there should be Four. Order to discharge an Apprentice quashed.

Apprentices.

Peck's Case. Mich. 10 Will. 3.

1 Salk. 66. S. C. Where the Master dies his Executors having Assets shall provide for the Apprentice. 2 Stra. 1266.

THE Master took an Apprentice in Husbandry, and before the Time of Apprenticeship expired the Master died, and left the Apprentice impotent and a Cripple, the Justices made an Order, that the Executors of the Master should receive and provide for this Apprentice; but this Order was quashed, because it did not appear that they had *Assets*, or that they lived in the same County; and by *Justice Giles Eyre*, this is a personal Trust, and determines upon the Death of either the Master or Apprentice, and the Executors may be of no Trade, or of another Trade than the Master was; but he held, that an Action of Covenant would lie against the Executors, but then the Plaintiff must prove *Assets*. And *per Holt* Ch. Just. by the Custom of *London* in such Cases, the Executors shall put out the Apprentice to another Master of the same Trade; and in other Places, where a Master hath a great Sum with an Apprentice, and covenants for his Instructions and Maintenance, it would be hard to construe his Death to be a Discharge of * those Covenants; and that it hath been adjudged, that though the Covenants for Instruction may fail, yet he still continues an Apprentice with the Executors or Administrator, to be *maintained* by them.

* P. 42

Anonymous.

Mod. Cases, 70. The Master brought Covenant against the Apprentice for departing at such a Time.

THE Master brought an Action of *Covenant* against his Apprentice for departing out of his Service at such a Time. The Defendant justified by Virtue of a *Licence* from his Master to depart at that Time; and Issue being taken upon the *Licence Holt*, Ch. Just. held, that upon such a Declaration the Master shall not give Evidence of the Defendant's departing without Leave at any other Time, because in this Case the Time is material and not transitory, as in *Trespass* and other Cases.

White versus England.

4 Mod. 145. S. C. Debt upon the Statute for the using the Trade of a Tiler, not setting forth, that it was a Trade used in England, at the Time when the Statute was made.

DE B T upon the Statute of 5 *Eliz.* for using the Trade of a Tiler, not being Apprentice to that Trade for seven Years. The Defendant pleaded, that his Father was a *Freeman of London*, and that he (this Defendant) was his eldest Son; and that by Virtue of a Custom in *London*, the eldest Son of a *Freeman in re patrimonii* might use his Father's Trade. The Plaintiff demurred to this Plea, and the Counsel for the Defendant did not insist upon it, but objected, that the Declaration was ill, because the Plaintiff did not aver, that the Trade of a Tiler was an Art or Mystery used in England, at that Time when the Statute was made. *Sed per Holt*, Chief Justice, the very Trade is mentioned in this Statute, and therefore it must necessarily be intended, that it was used at that Time.

The Queen versus Collingwood.

Mod. Cases, 288. Inticing an Apprentice to take away his Master's Goods, not Criminal unless some Goods were actually taken away.

THE Defendant was indicted, for *enticing* an Apprentice to take away his Master's Goods, which he (the Defendant) did receive, &c. Upon Not guilty pleaded, the Defendant was found guilty; but upon a Motion in Arrest of Judgment, it was held *per Holt*, Ch. Just. that the Indictment was ill, because it did not set forth, that the Apprentice did *actually take away any Goods*; for an *Enticement* is not Criminal, without something done in Pursuance of it: 'Tis true, this Indictment sets forth, that the Defendant did receive the Goods, which implies that they were taken away: for otherwise they could not be received; but * a Charge in an Indictment must be positive, certain and direct, and not by Implication.

* P. 43

Appropriation.

AN Appropriation of an Advowson, Church, Glebe, Tithe, &c. must be to Plowd. 495.
some Body Politick or Corporation; and when it was made by the Patron or first
Founder, the Form was thus: *Ego W. R. de H. concessi Ecclesiam & advocacionem*
meam de H. cum terris & decimis omnibus ad eam pertinentibus Abbati de S. &c. so
that not only the Advowson and Profits of the Church, but the Incumbency it-
self, which is a spiritual Thing, vested in the Appropriator.

At Common Law an Appropriation could not be made but to a Body Politick,
or to a Corporation, for a natural Person is not capable of it, because he cannot
be perpetual, and an Appropriation makes an Incumbent perpetual.

And at Common Law it could not be made to a Lay Person, for as he could
not be an Incumbent by a Presentation, so he shall not by an Appropriation, which
is but a more lasting Incumbency,

These Appropriations at first were made to *abbots, Deans, and sole Corporations*,
who might administer Sacramentals, and had Cure of Souls; but afterwards by
Dispensations they were made to spiritual Corporations aggregate, who had no
Cure of Souls, as to *Deans and Chapters*, and at last to Nuns under Pretence of
Hospitality. *Grande nefas*, as Dyer calls it. Plow. Com. 497.

An Appropriation cannot be granted over, for 'tis an Incumbency, which is Hob. 307.
a spiritual Thing, 'tis included in the spiritual Function, which being of the
highest Trust, cannot be transferred.

It cannot be made without the Patron, for his Advowson being a Lay Inheritance, Appropriation cannot be
cannot be divested without his Consent, neither can it be made without the Consent made without the Patron.
or Concurrence of the King, because the Advowson itself is held of him mediately
or immediately, and he shall not lose his Possibility of Escheat or Lapse, without
his Consent, but an Appropriation may be made by the Patron, and the King
acting as supreme Ordinary, without the Bishop; and the Reason is, because, be-
fore the Reformation it might have been made by the King, by the Patron and the
Pope, and whatever the Pope might have done is now vested in the King by the
Statute of H. 8.

* Arbitrement. See The Doctrine of Awards, Cases * P. 44
Temp. Lord Hardwicke, 181. Burro. 277, 278, 701.

WH E R E an Umpire is to be chosen by the Arbitrators, the same Time Umpirage.
may be limited to the Umpire as was limited to them to make their
Award; for by choosing an Umpire they determine their own Power.

Where a Submission was to the Award of A. and B. *ita quod* they make it by 2 Vent. 116. Sid. 428.
such a Time; and if not then, to the Sentence of such Umpire as they shall 2 Saund. 127. Mod.
choose; *ita quod* he make his Umpirage in the same Time; an Umpirage so 275. Jones 167. 1
made is good, because here was no concurrent Authority, for by choosing an Um- 1 Roll. 262. contra.
pire the Arbitrators had determined their own Power; and therefore, though the
Arbitrators should make an Award after they had chosen an Umpire, the Umpi-
rage shall be good, but the Award void.

The Law is the same, if the Umpire was appointed by the Parties themselves;
for 'tis not an absolute and concurrent Jurisdiction, 'tis only a Power given to the
Umpire to act, and that his Umpirage shall stand, if the Arbitrators do not act
and make an Award.

Where the Submission is *ita quod* the Award is made under Hand and Seal, Pursuant to the Submission.
and the Award is only written, but not subscribed, 'tis void; but if the Arbitra- Palm. 109, 112, 121.
tor make his Mark, 'tis sufficient. 2 Bull. 110. 2 Cro.
277, 399. 1 Roll. Rep.
223. Yel. 203. 1 Vent.

The 50.

Arrest.

The Submission was to an Award of *W. R.* and *three more, ita quod* it be made by all four, three, or two of them, in such Case an Award made by two or three of them is good, because the joint Authority which was first given to all four, was distributed by the *ita quod, &c.* and an Authority may be divided, though an Interest cannot.

Palm. 108.

A. and *B.* submitted all Controversies concerning their Title in *H.* a Sum of Money was awarded to one, and that he should Release all Actions; the Defendant to avoid this Award, avers there were other Actions: *Sed non allocatur*, for it shall be intended only of such Actions as they had Power over by their Submission; and if he should be sued for not releasing any Action which doth not concern this Title, he may plead the Award as to that was void.

* P. 45

* *Freeman versus Bernard.* Hill. 8 Will 3. B. R. 1 Ld. Raym. 247. S. C.

1 Salk 69. S. C. Plea of an Award to sign mutual Releases, not good.

CASE on an Agreement, the Defendant pleaded a Submission, *&c.* and an Award made to sign mutual Releases adjudged an ill Plea; for 'tis not intended, that the Breach of the old Agreement should be discharged by this Award, but by the Release; 'tis otherwise where the Award itself discharges the old Duty and gives a new one.

Arrest.

Brown versus Burlace. 9 Will. 3. B. R.

The Temple is extraparochial, but an Arrest there was not set aside. Postea Privilege 12. S. C.

IN this Case it was held, that the Temple is extraparochial, and not within any Parish, that 'tis not within the City of London, so as to come within the Customs, but 'tis within the County of the City, but that the *White Fryars* was within the Jurisdiction of the City.

That both *Dugdale* and *Stow* tell us, that the Temple is privileged from Arrests by the Grant of the King: *Sed per Holt* Ch. Just. If the King hath made such a Grant, 'tis void, because the *Templers* have no Court of Justice within themselves, yet the Court inclined not to countenance Arrests in the Temple in Term-time; but would not set aside the Arrest of the Defendant, who was arrested in the Temple, and so he was held to Special Bail.

Anonymous. Pasch. 7. Will. 3. B. R.

Moor 767. 6 Rep. 54. 9 Rep. 69. A common Bailiff is not bound to shew his Warrant, but a Special Bailiff is.

* P. 46

3 Cro. 180, 408. Moor 711. Sid. 229.

ADJUDGED, that a common Bailiff is not bound to shew his Warrant, either at the Time of the Arrest, or at any Time after; but he is bound to shew the Cause of the Arrest, and at whose Suit; but a Special Bailiff may be required to shew his * Warrant, for he is not known as a common Bailiff is, and no Man is bound to submit himself to one who is not known or presumed to have an Authority.

If a Writ is returnable, 9 Feb. or Octab. *pur.* the Defendant cannot be arrested by Virtue of such Writ, either on the 10th or 11th of February, though 'tis before the *Quarto die post*, if he is arrested, the Officer cannot justify it, either in Trespass or False Imprisonment brought against him; but if the Defendant be taken on a *Ca. Sa.* on the ninth Day of February, which is the very Day the Writ was returnable, the Arrest is good.

Pas. 8 Will. 3.

Where a *Capias* is awarded against *W. R.* and a Common Bailiff knows the Writ to be in the Hands of the Sheriff: *Per Holt* Ch. Just. he may arrest *W. R.* without actually having the Warrant.

9 Rep. 66.

An Arrest in the Night is good.

Assignment on the Statute 32 H. 8. Cap. 34.

One arrested in *Westminster Hall*, *sedente Curia*, may be discharged upon Motion, if the Arrest was on *Mesne Process*, but not if he was taken in Execution, but even in that Case the Officer is punishable *per Curiam*. Bull. 85.

In Cases of Peers and Corporations the Process is a *Distringas*, for they cannot be arrested

Assault and Battery.

ADJUDGED, that the Defendant may justify an Assault in Defence of his Person, or of his Wife, because they are but as one Person; so he may in Defence of his Master, because Protection and Allegiance is due to him.

So he may justify in Defence of his *Father* or *Mother*, *Children* within Age; and even a * Wounding may be justified in Defence of his Person, but not of his Possessions. * 1 Roll. Rep. 19.

* In Assault, &c. the Defendant may justify the Assault to save his Person, but not to defend his House or Possession; for in such Case he must plead *Molliter manus imposuit*; but the Law seems to be, that he may justify an Assault in Defence of his *House*, though in such Case he cannot justify any *Wounding*. Hill. 8 Will. 3. B. R. 2 Roll. 548. Latch 20.

In Trespass for a Battery and Wounding, *Son Assault demesne* is a good Plea, for in this Action the Trespass is the Principal; but in *Mayhem* 'tis not a good Plea, unless it appear, that the Assault was such as endangered his Life, for a Man cannot justify a *Mayhem* for every Assault; as for Instance, a Man cannot justify drawing his Sword, and cutting of the Hand of another, because he struck him; but in such Case the Defendant ought to plead the Assault specially (*viz.*) That the Plaintiff assaulted him and knocked him down, &c. *Et si malum aliquid evenit*, &c. *de injuria sua propria*, &c. Son Assault Demesne, a good Plea for a Battery and Wounding, but not in Mayhem. * P. 47 3 Cro. 268. 2 Roll. 547.

A Master may justify the Beating his Apprentice, Servant, Scholar, &c. if the Beating is in Nature of Correction only, and with a proper Instrument, otherwise *immoderate castigavit* is a good Reply; and so, it was adjudged in *Keits's Case per Holt Ch. Just.*

Assault and Battery; the Defendant justified, for that the Plaintiff was his Apprentice, and that he *tempore quo*, &c. gave him gentle Correction, and traversed that he was guilty at any Time before or after he was his Apprentice; and upon a Demurrer to this Plea it was adjudged ill, because the Defendant ought to shew some Cause specially, or the Fault for which he beat his Apprentice, and then conclude *absque hoc*, that he beat him before or after that Time. The Defendant justified, that he gave his Apprentice gentle Correction, but did not say for what.

Assignment on the Statute 32 H. 8. Cap. 34.

THE Lessor made a Lease for Years, and afterwards assigned his Reversion to *W. R.* Adjudged, that all Conditions and Covenants between the Lessor and Lessee which concern the Thing demised, or Rent reserved; as for Instance, Conditions or Covenants for *repairing*, &c. *paying the Rent*, &c. are annexed to the Reversion by this Statute, and pass with it to the Assignee, so that he may take the same Advantage of them as the Lessor himself might have done before he made any Assignment; but not any collateral Covenants, as to pay a * Sum in Gross, &c. are transferred to the Reversion by this Statute. Conditions and Covenants which run with the Land, are annexed to the Reversion, and go to the Assignee. * P. 48

Adjudged, that a Bargainee is an Assignee within this Statute; and so, if he grant his Reversion to the Use of *W. R.* and his Heirs, the *cestui que Use* and

Attachment Foreign.

the Bargainee, are in by this Statute as *Assignees*, for they are in by the Limitation of the Grantor, *and quoad* him they are Assignees.

Who is an Assignee within this Statute. 1 Inst. 215.

If a Man makes a Lease for Life to *A.* and afterwards grants the Reversion to *B.* either for Life or Years, *B.* is an Assignee within this Statute; but if he grant the Reversion only of two Acres, or Part of the Land, he is not an Assignee within this Statute to take Advantage of Conditions, because he hath but Part of the Reversion, (*i. e.*) a Reversion in Part of the Demise, and the Conditions being entire, and against Common Right, cannot be apportioned.

1 Lev. 22.

The Assignee of a Rent, without the Reversion, may maintain an Action of Debt for the Rent, if there was an Attornment made, so by that and the Assignment a Privity of Contract passes.

Though the Lessee assigns, yet the Lessor may have an Action of Debt for the Rent, and so may his Executor, for there is a Privity of Contract between them.

Sid. 127.

But the Heir of the Lessor cannot maintain an Action of Debt, because the Estate is not in him, but in the Assignee, and there is no Privity of Contract between them.

Debt for Rent was brought against an Assignee; the Defendant pleaded, that he assigned over his Lease; this is ill, unless he shew also, that the Lessor had Notice of the Assignment, and that there was nothing due at the Time of the Assignment; but Covenant will lie against the Lessee, after such an Assignment and Acceptance of Rent.

* P. 49

* Attachment Foreign.

Masters versus Lewis. Trin. 7 Will. 3. B. R. 1 Ld. Raym. 56. S. C. Skin. 516. S. C.

3 Mod. 75, 92. S. C. Foreign Attachment charges only the Debtor.

A Creditor of *W. R.* attaches Money in the Hands of the Ordinary. Adjudged, that it could not be, for a Foreign Attachment cannot charge any other Person than the Debtor himself, which the Ordinary is not, before Goods of the Intestate come to his Hands, for no Creditor of the Intestate can sue him till he hath actual Seisin, and before such Seisin he hath so little Interest in the Matter, that he can neither release or bring the Action; but Goods in the Hands of an Executor or Administrator may be attached by a Foreign Attachment, because they are Debtors; and yet by this Means a Debt upon Simple Contract may be paid before a Debt upon Specialty.

Ingram versus Bernard. Hill. 13 Will. 3. B. R. 1 Ld. Raym. 636. S. C.

Money awarded was attached.

THE Arbitrators made an Award, that *W. R.* should pay so much Money on the *second Day of January*, he having given a Bond to perform the Award that was attached on the *first Day of January*, and the Money awarded was taken upon that Attachment on the *second Day of January*. And *per Holt, Ch. Just.* This would have been a good Plea in an Action of Debt brought upon the Award, but not to an Action of Debt brought upon the Bond of Submission, because the Bond is forfeited; and when a Bond is forfeited, 'tis not the Money in the Condition, but the Money in the Bond itself which is attached.

1 Roll. Abr. 552.

1 Roll. Rep. 268. Where a *Procedendo* was granted after an Attachment.

* P. 50

A Debt due by Judgment obtained in the Courts of *Westminster*, whether the Action was for Debt or Damages, cannot be attached by the Custom of *London*.

A Creditor of *W. A.* attaches his Debt in the Hands of *W. S.* who was indebted to the said *W. A.* and this being removed into *B. R.* by *Certiorari*, a *Procedendo* was granted, because the Party cannot have the like Remedy in *B. R.* as he may in *London*. * *Et per Curiam*, if *A.* should sue *W.* here, and the Defendant should plead the Foreign Attachment, we will allow the Custom, because it comes in by way of Plea; but where it comes by way of Original Suit we cannot do Right to the Parties, therefore a *Procedendo* was granted.

Attorney.

Attorney.

IN all Actions at *Common Law*, and in all Courts, both the Plaintiff and Defendant appeared in Person; for the Writ commanding them formerly to appear, it was understood an Appearance in Person, and therefore the Entry is still *Querens obtulit se*, by which Policy there were many vexatious Suits prevented and avoided; for the Parties were compelled to follow their Suits in proper Person, and could not otherwise prosecute, unless they had the King's special Warrant for that Purpose.

But though the Parties could not appear by Attorney, yet after Appearance, and when the Suit was in any of the Superior Courts at *Westminster*, they had Power to allow them to proceed by Attorney; but in other Courts that Privilege was not allowed, but the Party must sue out a *Dedimus potestatem de Attornato facienda*.

One who is Attorney of Record, may bring an Action of Debt or an Action on the Case for his Fees; but he, who is not an Attorney of Record, can only have an Action on the Case.

Assumpsit by an Attorney, in which he declared, that the Defendant promised Allen 4: to pay his Fees; the Defendant pleaded the Statute 3 Jac. and that the Plaintiff had not given him a Bill under his Hand; and upon a Demurrer to this Plea the Plaintiff had Judgment, because the Statute doth not extend to a special Action upon the promise. See Stat. 2 Geo. 2: For Regulating of Attorneys and Solicitors.

Anonymous. Trin. 2 Annæ.

IF an Attorney appear, and Judgment is against his Client, and he had no Warrant of Attorney from him to appear, the Question was, if the Court would set aside the Judgment. *Et per Curiam*, If the Attorney is responsible, it shall not be set aside, because the Judgment was regular; and there is no Reason that the Plaintiff should suffer when he is not in Fault: But if the Attorney is not responsible, or suspected to be unable, the Judgment shall be set aside, for otherwise the Defendant has no Remedy. Where an Attorney appears without a Warrant and Judgment is had against his Client, it shall not be set aside, if the Attorney is responsible. P. 51

Attornment.

Quarn *versus* Rowe. Hill. 5 Will. 3. B. R.

THIS Case is reported in 1 Salk. by the Name of *Gwam & al^r versus Roe*, but not in the following Manner, which was thus:

ff. Tenant in Tail made a Lease to *W. R.* to commence five Years after, but in the mean Time he levied a Fine to *L. R.* to the Use of the Conusee and his Heirs; afterwards the Lessee entered by Virtue of this, and the Conusee brought an Action of Debt against him for Rent arrear reserved on the said Lease; and upon a Demurrer to the Declaration it was objected, that it was ill, because the Plaintiff did not set forth any Attornment, and he being in by the *Common Law*, and not by the Statute of Uses, an Attornment is necessary to create a Privity and to support this Action: But this Objection was not allowed, because the Lessee having only an *Interesse Termini* at the Time of the Fine levied, could not attorn; and the Reversion upon his Term passed at that Time as included in the Possession. Where an Attornment is necessary to create a Privity.

W. R. made a Lease to *B.* for fifty Years, and afterwards granted his Reversion to *R.* then *B.* assigned the Term to *R.* before any Attornment, and before he had Notice of the Grant of the Reversion: Adjudged, that the whole Estate

Averment.

is vested in *R.* immediately, and that the Term is extinguished; for in this Case there is no Body to attorn, and therefore the Law vests all in *R.* without any Attornment.

1 Vent. 248.
* P. 52

* The Lessor granted the Reversion to another, and afterwards brought an Action of Debt for the Rent; the Lessee pleaded, that he had granted away the Reversion, but did not set forth that he attorned; adjudged, that this Plea of itself amounted to an Attornment.

2 Cro. 87.

Adjudged, that an Attornment to Part is good for the Whole, for it shall be taken most strongly against him; and he having only a Power to assent, he cannot divide or apportion the Thing granted.

Averment. See Superstitious Use 3.

Matthews *versus* Carey. Mich. 1 Will. 3. B. R.

(1)
1 Salk. 107. S. C. 3
Mod. 137. In Trespass
the Defendant justified
under a Presentment in a
Leet, and good.

IN *Trespass* for taking a Distress, the Defendant justified, under a *Presentment in the Leet*, for an Offence, &c. and did not aver in his Plea, that the Offence was committed; and upon a Demurrer it was adjudged, that he need not make such an *Averment*, because as to him 'tis not material whether the Offence was actually committed or not, 'tis sufficient that the Jury had presented it; and as to this Matter, the Court distinguished between a *Replevin* and a *Trespass*, for in the first Case the Bailiff is an *Actor* and must recover upon the Merits of the Cause, but in *Trespass* he is only to excuse the Wrong alledged against him, but the Plea was adjudged ill upon another Point: which see in 1 Salk. 108.

(2)
Negative Pleas need not
be averred.

Adjudged, that *negative Pleas* ought not to be averred, because a Negative cannot be proved; but affirmative Pleas must be averred, with *hoc paratus est verificare*.

(3)
Where hoc paratus est
verificare is good.
* P. 53

* In Debt upon a Bond for Performance of Covenants; the Defendant pleaded Performance; the Plaintiff replied, that he was bound to give him (the Plaintiff) an Accompt of all Money received, &c. and shews, that 10 *l.* came to his (the Defendant's) Hands, and that he had not accounted for it; the Defendant, in his Rejoinder, confessed the Receipt of the Money, but pleaded, that he laid it up in his Master's House, and that it was stolen, *Et hoc paratus est verificare*; adjudged, that this Averment was proper, and that he ought not to have concluded to the Country, because, having alledged new Matter, he ought to give the Plaintiff Liberty to come in and answer it.

But now the Want of *paratus est verificare*, or *prout patet per Recordum* is aided by the Statute 16 Car. 2.

Mason *versus* March. Trin. 11 Will. 3.

(4)
Where a Teste of a Writ
is in Support of Justice,
an Averment shall not be
against it.

IN *False Imprisonment*, laid to be in the Vacation, the Defendant pleaded a Writ issued *Teste in Term-time*, *per quod* he took the Plaintiff; he may reply, that though it was *Teste in Term*, yet he took him in Vacation; for *per Holt Ch.* Just. where the *Teste of a Writ* is in Support of Justice, no Averment shall be admitted against it, otherwise where 'tis to justify a Wrong done.

Abowry

Avowry.

NOT only he who brings the *Replevin*, but the *Avowant* also is an Actor; for the one sues for Damages in taking the Cattle, and the other sues for a *Retorn habend'*, or a Restitution of the Goods taken; and therefore the Avowant (*i. e.*) The Defendant must conclude his Avowry as Declarations are concluded, and not with an *hoc paratus est verificare*, for he is an Actor, and his Avowry is his Declaration, and the Return of the Goods is his Recovery. (1) Plowd. 392.

In an Avowry for *Damage-feasant*, the Defendant intituled himself under a Lease of the Husband, and for not shewing it was by Deed; for that it could not be the Lease of the Wife, but of the Husband only; and this being made an Objection, it was *disallowed, because the Plea was by Way of Bar, and a Bar is good to a common Intent. (2) Sav. 111. * P. 54

In *Replevin*, the Defendant made Conusance, for that the Goods taken were the Goods of *W. R.* and not the Goods of the Plaintiff; and upon a Demurrer to this Avowry, the Avowant had Judgment, for though he did not pray a Return in his Avowry, yet he shall have Judgment for a Return, because it appears by the Declaration, that the Defendant took the Goods, and so had the Possession of them, till by the *Replevin* they were delivered to the Plaintiff, and therefore they shall be returned to the Defendant, that he may be *in statu quo prius*, &c. (3)

In *Replevin*, the Defendant avowed for *Damage-feasant*, and had a Verdict; adjudged, that he shall have a *Retorn habend'* for the Cattle, and a *Ca. Sa.* for the Damages; but if the Party tender the Costs and Damages, the Sheriff after such Tender ought not to execute the *Retorn habend'*. (4)

But if for Want of such Tender the Sheriff doth execute the *Retorn habend'*, 3 Cro. 162. and afterwards the Costs and Damages are paid, a Writ *si constare poterit*, &c. lies upon suggesting, that the Costs, &c. are paid; and this is to deliver the Distress, and this is called a Writ of Restitution.

Parker *versus* Meller. Pasch. 2 Annæ.

IN *Replevin*, if the Defendant had the *Possession*, 'tis a good Bar against the Plaintiff if he has no Title, but he cannot give a Return, unless he shew a Property in the Goods; and 'tis sufficient if they were delivered to him; for otherwise the Judgment must be *quod quærens nil capiat per Billam, but no* Return. (5)

Authority. See Deputy. A Lease at Will. 3.

* Bail.

* P. 55

Wyatt *versus* Evans. Hill. 5 Will. 3. B. R.

DEBT for 99 s. upon a *Plaint* levied in an *Inferior Court* and Bail put in; Where Bail put in upon afterwards the Cause was removed by *Habeas Corpus* into *B. R.* and there the Removal of a Cause by the Plaintiff declared as in Debt upon a Bond for 6 l. The Question was, whether *Habeas Corpus*, is not the Bail put in here, upon the *Habeas Corpus*, should be liable? and adjudged, liable. (1)

VOL. III. 6 R that

Bail.

that they should not, for it was another Cause of Action than that to which they were Bail.

Anonymous. Pasch. 4 Annæ B. R.

(2)
Debt in B. R. on a Recognizance of Bail in C. B.

DE B T was brought in C. B. and a Recognizance taken, and an Action of Debt was brought on that Recognizance in B. R. The Court was moved, that there might be no *Special Bail* given, for that this was only a Device to better the Security. *Sed per Holt*, Ch. Just. and *Powell*, Upon a Recognizance of Bail in C. B. no *Capias* lies, because 'tis for a Sum certain; but upon the like Recognizance in B. R. a *Capias* lies, because 'tis *Body for Body*, and there may be a Reason to help them to a *Capias* upon the Recognizance; and *per Holt*, in Debt upon a Judgment pending a Writ of Error, the Court will discharge the Defendant upon Common Bail; but *per Powell* Just. 'twas anciently otherwise.

Butler *versus* Rolls.

(3)
Mod. Cafes 25. Where Proceedings were staid upon the Bail bringing in the Principal Money, and Interest, and Costs into Court.

THE Defendant was sued on a Bail-Bond; to which Action he pleaded and had Notice of Trial, and then he moved to stay Proceedings on the Bond, upon bringing the Principal Interest and Costs into Court, which was granted, so as he bring it in such Time, that the Plaintiff might not be delayed of the Trial, otherwise to proceed.

* P. 56
(4)
Mod. Cafes 229 Proceed- ings on the Bail-Bond must stay, if there is not Return of a Capi Corpus.

* It was ruled *per Holt*, Ch. Just. That the ancient Course was, that a Bail-Bond could not be put to Suit till a Rule was had to amerce the Sheriff, for not having the Body at the Return of the Writ; and the Course now is to stay Proceedings on the Bail-Bond, if there is no Return of a *Capi Corpus*.

Craggett *versus* Glover.

(5)
Mod. Cafes 301. Where a Prisoner discharged and retaken must find Special Bail.

AF T E R a Prisoner for Debt under 100 *l.* was discharged by the Justices pursuant to the Act of Poor Prisoners, he was taken again for above 100 *l.* at the Suit of one Man, and it was ruled, that he must find Special Bail.

Gibbons *versus* Dove.

(6)
Mod. Cafes 230. Bail on a Writ of Error, the other Side hath twenty Days Time to except against them.

BA I L was put in upon bringing a Writ of Error; the Course is, that the other Side shall have twenty Days to except against them, which Exception must be entered in the Book of the Clerk of the Errors, and then he who excepts, must take out a Rule to put in better Bail, and serve the Attorney on the other Side with it; but such Rule needs not be served within twenty Days.

Barney's Case.

(7)
5 Mod. 323. A Woman bailed that was indicted for Petit Treason.

A Feme Covert was indicted for *Petty Treason*, in murdering her Husband; and the Grand Jury having found the Bill, she was brought to the Bar, and moved by her Counsel, to be bailed; and there being some *Affidavits* read of the Fact, by which it appeared to the Court, that the Prosecution was malicious, and there having been no Proceedings for some Time, either upon the Indictment or the Coroner's Inquest, the Court thought fit to Bail her.

(8)
2 Cro. 738. 2 Bulst. 182. Moor 850. Ca. Sa. against the Principal, and Non est inventus returned, yet the Court will receive a Render in Favour of the Bail.

Adjudged, That tho' *Non est inventus* is returned upon a *Ca. Sa.* against the *Principal*, yet the Court will receive a *Render*; so they will upon the return of the first *Sci. fa.* against the *Bail*, and so they will upon the Return of the second *Sci. fa.* so as it be done on the Day of the Return, either sitting the Court, or afterwards at a Judge's Chamber; but though the Court doth receive such *Render*s in Favour of the *Bail*, yet 'tis *de mera gratia*, and not *de jure*, and therefore the *Bail* cannot plead such *Render* to a *Sci. fa.* brought against them.

But

Bail.

* But in a *Scire facias* against the Bail, they may plead the Death of the Principal before the Return of the *Capias*; for they had Time till then to render him, but not afterwards, for by the Return of *Non est inventus*, the Recognisance is forfeited. (9)
Where the Bail may plead the Death of the Principal.
* P. 57

King *versus* Sharp. Hill. 7 Will. 3. B. R.

Scire facias against the Bail, who plead, that the Principal died before the Return of the *Capias*, &c. and upon a special Demurrer, this Plea was adjudged ill; for it should be, that he died before the Return of *any Capias*, that it may appear he was not alive at the Return of the first *Capias*, for if he was, the Recognizance is forfeited. (10)
5 Mod. 167. Bail pleaded, that the Principal died before the Return of the *Capias* against the Principal, not good. Jones 29.

Now the Reason why the Death of the Principal before any *Capias* sued out, is a good Plea, is, because the Principal had Election either to pay the Money, or to render his Body to Prison, and the last is become impossible by the Act of God. (11)

But the Bail in a *Writ of Error* cannot render the Principal in Discharge of themselves, because they are bound, that he shall prosecute his Writ of Error with Effect, or pay the Money, if Judgment be affirmed. (12)

Grosvenor *versus* Soame. Hill. 2 Will. 3. B. R.

IF the Sheriff take *insufficient Bail*, no Action lies against him; but if he hath not the Defendant forthcoming to appear and answer the Plaintiff, he may be amerced, but not after the Plaintiff hath accepted an Assignment of the Bail-Bond. (13)
Mod. Cases, 122. No Action lies against the Sheriff for taking insufficient Bail.

Page *versus* Price.

WHERE an *Executor* is sued in the *Detinet*, as he must upon the Contracts of his Testator, he shall not put in Special Bail; but he must, if he is sued on his own Bond or Contract. (14)
Where an Executor shall put in Special Bail, where not.

Nota, All Crimes were bailable at Common Law, for *Carcer est mala mansio*, that Place being Surety for none but such who could find no other, and they were bailable by the * Sheriff or Bailiffs of Franchises, and sometimes by Writs; as that *De odio & atia Homine Replegiando*, or the Writ *De Manucaptione*, and sometimes *Ex officio*, and in all Cases by B. R. upon a *Habeas Corpus*; but *Homicide* was by Statute excepted out of the Power of the Sheriff, so that he could not Bail in that Case, without the Writ *De odio & atia*, and that was founded upon an Inquisition, by which it was found, that the Party was indicted out of Malice. (15)
* P. 58

But in Cases of *Murder*, *Manslaughter*, *Felony*, &c. the Party is not bailable per Statute *Westm. 1. cap. 15.* especially where there is any Presumption of Guilt (*i. e.*) he is not bailable by the Justices of Peace, for they are within this Statute; but they are bailable in B. R. at Discretion, for the Statute doth not extend to that Court. (16)

Anonymous. Trin. 11 Will. 3. B. R. 1 Salk. 104. pl. 7. S. C.

A Person was committed for *Murder*, and he moved to be bailed. Two Judges were of Opinion that he might, because the Evidence did not prove him guilty; but *Holt Ch. Just.* and *Gould, Just.* were against it, for that the Evidence did affect him, and to allow him this Favour would discourage Prosecutions; and they would not give any Opinion of the Evidence, for as it might (17)
Murder not bailable.

Bankrupt.

might prejudice the Prisoner on the one Side, so it might the Prosecutor on the other Side.

Anonymous. Pasch. 7 Will. 3.

(18)
One in Execution for
Usury, not bailable.

PER Holt, Ch. Just. one in Execution upon a Judgment for Usury, brought a Writ of Error in *B. R.* and moved to be bailed, but it was denied, though there was an apparent Error in the Record, and though it was formerly the Practice to bail in such Case; for *per Curiam*, we ought not to enlarge a Prisoner in Execution; but 'tis otherwise upon an *Audita Querela*.

* P. 59

* Bankrupt.

Feltham *versus* Cudworth. Pasch. 12 Will. 3. B. R. Rot. 97.

(1)
Far. 10. Composition
made by Virtue of the
Statute against Bankrupts,
must be final.

SCire facias on a Judgment, the Defendant pleaded a Composition for 2 s. in the Pound: *Ita quod* it be paid within five Years after the major Part of his Creditors in Number and Value shall subscribe the said Composition; and after the Defendant should be *discharged from Imprisonment*; and upon a Demurrer to this Plea, Holt Ch. Just. was of Opinion, that a Composition by Virtue of the Statute must be final, and such as will bind the Defendant, and from which he cannot vary, that those Words *ita quod*, in Things executory (as in this Case) make a Condition precedent; but in Estates executed, they make a Condition subsequent, and so is *Littleton* to be understood, that the payment of 2 s. *per* Pound, being a *Condition precedent* to this Agreement, and wholly in the Power and Will of the Defendant till 'tis paid; 'tis therefore no complete Agreement, and consequently not within the Statute; and this Case is the stronger against the Defendant, because it doth not appear by his Plea, that *he was in Prison*, so that this Condition precedent may be impossible to be performed, and consequently the Agreement can never arise; 'tis true, it might have been otherwise if the 2 s. in the Pound had been agreed to be paid within the five Years, in the Nature of a Deceasance to the Agreement, for this Statute operates as a Deceasance.

Huffey *versus* Fidell. Hill. 12 Will. 3. B. R.

(2)
Sale of Goods by a Bank-
rupt after an Act of Bank-
ruptcy, void.

A Djudged that a Sale of Goods by a Bankrupt, after an Act of Bankruptcy, is not merely void; the Contract is good between the Parties, but it may be avoided or not avoided by the Commissioners and Assignees at Pleasure; therefore they may either bring Trover for the Goods, as supposing * the Contract to be void, or may bring Debt or *Assumpsit* for the Value, which affirms the Contract.

* P. 60

Ellis *versus* Ollave. Trin. 11 Will. 3. B. R.

(3)
Composition made with
the Parties signing, binds
the rest,

I N a Case between the said Parties, an Objection was made to the Composition, for that the Agreement appeared to be only to, for, and *with these Creditors who were Parties, and had signed the Composition*; but this Objection was disallowed, because the Statute makes this an Agreement for the rest.

Dyson *versus* Glover. Trin. 11 Will. 3.

(4)
The Act recited as Non-
sense.

T HE Defendant setting forth and reciting the Statute in his Plea, alledged it thus, (*viz.*) *Quod liceret vadi & pro duobus, &c. realium creditorum facere agreementum, &c. cum aliquibus creditorum suorum; & per Curiam*, this being a private Act and set forth as *Nonsense*; and the Defendant having not brought himself

Bargain and Sale.

himself within it, 'tis ill ; for he hath compounded as a Debtor, and not as a Creditor : So the Plaintiff had Judgment.

The Custom of a *Manor* was, that where a *Copyholder* died seised in Fee, his Wife should have the third Part of his Lands for her *Dower* for Life, and thirteen Years after, which Custom was confirmed by Act of Parliament, afterwards the *Husband Copyholder* became a *Bankrupt*, and the Commissioners sold his Estate to his Creditors ; then the Husband died, and after his Death the Vendees were admitted, and the Wife claimed Dower, alledging, that her Husband died seised ; and the rather, because the Vendees were not admitted till after his Death : *Sed per Curiam*, the Estate of the Husband was bound by the Sale of the Commissioners, and the Bargainee was vested of the Estate, though he could not enter to take the Profits, till Admittance and Composition with the Lord for a Fine ; but if it should be otherwise, yet when once the Bargainee was admitted by the Lord, such Admittance shall have Relation, and divest the whole Estate *ab initio*.

(5)
Cro. Car. 568. Jones 451.
Copyhold Estate bound by
the Sale of the Commis-
sioners.

A Man became a Bankrupt 12 Feb. and afterwards, but before any Commission taken out, he made over his Goods to *W. R.* who was one of his Creditors, in Satisfaction of his Debt ; afterwards the Commissioners sold these Goods to other Creditors, who brought an Action of *Trover* against *W. R.* & per * *Curiam*, the Sale made to him by the Bankrupt is void by the Statute, for it would be absurd, that he should be credited to dispose and distribute his Goods, who is discredited by his Bankruptcy.

(6)
2 Cro. 25. Sale of Goods
by a Bankrupt, but before
any Commission taken out,
void.
* P. 61

Anonymous. Pasch. 7 Will. 3.

TWO joint Traders, one of them became a Bankrupt : *Per Holt Ch. Just.* the Commissioners cannot meddle with the Interest of the other, for 'tis not affected by the Bankruptcy of his Companion.

(7)
The Interest of a joint
Trader is not bound by
the Bankruptcy of his
Companion.

Bargain and Sale.

EMPTIO & Venditio is an Agreement for the Seller to part with a Thing for Money given to him by the Buyer, for if it be of one Thing for another in Specie, 'tis not a Bargain and Sale, but an Exchange, which was the original Way of Buying before Money was invented.

(1)

In *emptioe & venditione*, we are to consider not only what is the express Agreement of the Parties, but likewise what is implied *jure naturali & positivo*.

(2)

And first 'tis implied, that the Seller shall deliver the Thing sold, and that he shall keep it safe till 'tis delivered, which he is bound to do with the same Care as if it was a Thing lent to him ; for the Seller had, or is presumed to have, a Benefit by the Sale ; but this Care of keeping is only for a reasonable Time, for after a faulty Neglect of the Buyer, if the Thing is lost, the Seller is not liable, unless it was lost *dolo malo*.

(3)

Where no Place, or Time of Delivery, or Payment is appointed, 'tis always implied, that the Delivery be made immediately, and Payment upon the Delivery, unless 'tis inconsistent with the Nature of the Thing to be delivered.

(4)

Now by a bare Agreement the Bargain may be so far perfected, without any Delivery or Payment of Money, that the * Parties may have an Action on the Case for Non-performance of the Agreement, but no Property vests till there is a Delivery ; and therefore if a second Buyer gets a Delivery, he has the better Title.

(5)

* P. 62

Baron and Feme.

(6)
Bargain and Sale, without
any Consideration, not
good without an Attorn-
ment.

As to Bargain and Sale upon the Statute, it has been held, that if a Man plead a Bargain and Sale of a Rent, and set forth no Consideration, in such Case he must shew an *Attornment*, for then it enures as a *Grant at Common Law*, which cannot be without an *Attornment*; but if a Consideration is expressed, 'tis otherwise, because then 'tis a Conveyance by the Statute, to which an *Attornment* is not necessary, but then he must plead it to be inrolled, and in what Court, that the Defendant may be able to find it.

(7)
3 Cro. 166. Yelv. 213.

And as to that Matter, to plead a Bargain and Sale of a Reversion by Deed *Debito modo irrotulatus in Cancellaria*, is not good after a Verdict; for *non constat*, whether it be an Enrollment at Common Law, or by the Statute.

(8)

But if 'tis said *per Indenturam secundum formam Statuti debito modo irrotulatus in Cancellaria*, 'tis good for *debito modo* implies all, viz. a Consideration, and within *fix Months*.

Baron and Feme. See Executor 2.

Maddox *versus* Winne. Pasch. 12 Will. 3. B. R.

(1)
Where they are but as one
Person in Law.

HUSBAND and Wife were sued, and afterwards in the Pleadings it was said *Venerunt partes predictae per Attornatos suos predictos*, this was held naught upon a Writ of Error, because they are but one Person in Law.

* Woodier *versus* Gresham. Mich. 9 Will. 3.

* P. 63

(2)
1 Salk. 116. S. C. Scire
facias by Husband and
Wife on a Judgment she
had *dum sola*, and an
Award of Execution, and
then the Wife died, &
Right is attached in the
Husband.

* Mich. 3, Jac. 2. B. R.
Rot. 192. 3 Mod. 186.

SCIRE *facias* was brought by Husband and Wife, upon a Judgment obtained by the Wife *dum sola*, upon which *Scire facias* there was an Award of Execution, and then the Wife died, and the Husband brought a *new Sci. fa. &c.* and afterwards, upon a Writ of Error brought, the Question was, Whether what was recovered upon this Judgment should go to the Husband, or to the Administrator of the Wife? It was insisted for the Administrator, that the Award of Execution upon the first *Scire facias*, did not vest any Right in the Husband, because the Execution must still be on the Judgment obtained by the Wife. But *per Holt Ch. Just.* this Case doth not differ from the Case of * *Obrian and Ram*, which was Judgment against a *Feme Sole*, who afterwards married, and upon a *Scire facias* brought against Husband and Wife, Execution was awarded against both; then the Wife died, and a *Sci. fa.* was brought against the Husband alone, and he was adjudged to be chargeable, which proves, that the Award of Execution upon the first *Scire facias*, made a plain Alteration of the Case, for if that had not been done, the Husband would not have been liable upon the Judgment had against his Wife; so here, in the Principal Case, by the Award of Execution upon the first *Scire facias*, a Right is attached in the Husband, which shall survive to him after the Death of his Wife, and that he might charge another in the same Manner as he might be charged himself.

Buckly & Ux' *versus* Collier. Mich. 4. Will. 3. B. R.

(3)
Where the Wife ought
not to be joined in the
Action, unless an express
Promiss was made to her.

HUSBAND and Wife brought an Action on the Case, in which they declared, that the Defendant being indebted to them for Periwig Work done by the Wife, at the Instance and Request of the Defendant; he promised to pay, &c. and upon a Demurrer to this Declaration, it was adjudged ill, because the Duty belongs to the Husband, and shall survive to his Executors if he die; there-

Baron and Feme.

therefore she ought not to be joined in this Action with the Husband, unless an
* express Promise had been made to her to pay the Money.

2 Wilson 414. See a great Case on this Subject.

* 2 Cro. 77, 205.

* Machell & Ux' *versus* Garrett. Mich. 11 Will. 3. B. R.

CASE, &c. by Husband and Wife, for a Cause arising to the Wife before Marriage, &c. The Defendant pleaded, that the Plaintiffs *Nunquam fuerunt legitime matrimonio copulati*. The Plaintiffs replied, that *they were married* at such a Time and Place, and upon a Demurrer to this Replication, the Plaintiffs had Judgment; for *per Curiam*, in personal Actions (as this was) it was Right to lay the Matter upon the *Fact of the Marriage*, to make it issuable and triable by a Jury, and not upon the *Right of the Marriage*, as the Defendant had done in his Plea, and as it ought to be done in *Appeals* and *real Actions*.

* P. 64

(4)

Where Nunquam in legitimo modo copulati, is no good Plea.

Hutton *versus* Mansell. Pasch. 3 Annæ.

CASE by Feme Sole, in which she declared, *quod cum* she agreed and promised to marry the Defendant, he in *Consideratione inde*, promised to marry her, and at the Trial the Promise of the Man was proved. *Et per Holt*, Ch Just. there is no Necessity of proving an actual Promise on the Woman's Part; for 'tis sufficient Evidence to shew, that she countenanced the Promise, and carried herself so as one who approved and consented to it.

3 Lev. 65.

(5)

Adjudged, That where Baron and Feme mortgage the Lands of the Wife, and she dies, the Equity of Redemption shall survive to the Husband, and not to the Administrator of the Wife; but if he die, the Wife shall have the Benefit of Redemption, and not the Executor of the Husband.

(6)

Hob. 3. Roll. 344. Where Husband and Wife Mortgage her Lands, and she die, the Husband shall redeem.

Powell *versus* Maine.

T. M. entered into a Bond to a Feme Sole, conditioned to pay so much Money on a Day certain, and afterwards she married the Plaintiff, who brought an Action of Debt on this Bond. The Defendant demanded *Oyer* of the Bond and Condition, which was to pay so much Money to the Wife, and then he demurred to the Declaration. *Sed per Curiam*, Judgment was given for the Plaintiff.

3 Lev. 403.

(7)

Where he alone may bring the Action.

* Withers *versus* Kelsey.

* P. 65

(8)

A Woman had a Portion devised to her, and the Payment thereof was charged on certain Lands, afterwards upon her Marriage with T. S. he settled a Jointure on her, and died, before he received the Portion, having made a Will and appointed an Executor. Adjudged, That the Executor shall have this Money, because 'tis not in Nature of a Chose in Action, but in Nature of a Rent, for 'tis charged on Lands, and 'tis given the Husband by the Intermarriage; and for that Reason it shall go to his Executor, and not to his Wife surviving him.

1 Ch. Rep. 189. 1 Wilson 168, 169. Lands were charged to pay a Woman's Portion, she married and the Husband died before he received it, the Executor of the Husband shall have it.

Thompson *versus* Woods.

DEBT upon Bond conditioned to leave his Wife 80 l. at his Death in Case she should survive, so that she might receive and take it to her own Use; the Husband died, and in an Action of Debt brought against his Administrator, he pleaded, that the Husband made a Will, and his Wife Executrix, and left Goods to the Value of 100 l. and upwards, and devised, that she pay herself the said 80 l. and upon a Demurrer to this Plea, it was adjudged ill; because the Husband at his Death might owe Money on Judgments and Statutes, and so she might

3 Lev. 218.

(9)

S. C. Plea to a Debt on a Bond to leave his Wife so much, not good.

Bastard.

might not be able to pay herself, and his Estate might be so incumbered, that it would be better for her to renounce the Executorship.

Rands *versus* Tripp.

(10)
Promise to pay the Husband so much when his Wife should be a Lady, good.

THE Plaintiff being a Tradesman in *London*, and having married the Defendant's Daughter, with whom he had 400 *l.* Portion; the Defendant spoke merrily in Company, that as soon as his Son in Law should be Knighted, so that his Daughter might be a Lady, he would give her 2000 *l.* Afterwards the Plaintiff, without acquainting the Defendant with it, procured himself to be Knighted, and then brought an Action upon this Promise, and the Jury gave 1500 *l.* Damages, which the *Chief Justice* thought a very hard Verdict, because the Words were spoken merrily, intending only to pay the Money, when the Plaintiff by his Trade (which was a Tobacconist) should get an Estate to qualify him for Knighthood, and therefore a new Trial was granted.

* P. 66
See 1 Burn Just. Tit.
Bastard.

* Bastard.

Masters *versus* Child. Hill 10 Will. 3. B. R.

(1)
Bastard is settled in the Place where born, unless by Fraud she was delivered there.

RULED, that the Birth of a Bastard Child *prima facie* settles it in the Place where it was born; but if a Woman big with Child of a Bastard, and settled in one Parish, is persuaded to go into another, and there to be delivered, this Fraud will make the Parish chargeable where the Mother was settled, though the Child was not born there: But if a Woman with Child of a Bastard come accidentally into one Parish, and is persuaded by some of the Parishioners to go into another Parish, which she doth, and there is delivered, this shall not charge that Parish which persuaded her.

The Queen *versus* Chafin. Pasch. 1 Annæ B. R. 2 Ld. Raym. 858. S. C.

(2)
Order, that the reputed Father should give Security to perform the Order, quashed.

AN Order of Sessions was made upon an Appeal, for maintaining a Bastard Child, which Order was quashed; and thereupon it was moved, that the reputed Father might be bound in B. R. to appear below; and *per Curiam*, if the Original Order made by the Justices is below, we will oblige him to go down again, but if it is here, we cannot; and it appearing, that the Original Order was in B. R. and by Consequence, that the Justices could have no Authority below, the Court was moved, that the reputed Father might give Security to perform; but that was opposed, because the Course is to pray, that the Order might be confirmed, and then there is Occasion for giving Security, because, if the Order thus confirmed is not obeyed, the other Side may have the Process of this Court against the reputed Father, or he may be bound to appear at the Sessions; afterwards this Order was quashed as to Part, and confirmed as to the Residue; the Part for which it was quashed was, that the reputed Father should give Security to perform the Order, which, *per Curiam*, is naught.

(3)

A Bastard is *Terminus a quo*, he is the first of his Family, for he hath no Relation of which the Law takes any Notice, but this must be understood as to civil Purposes, for there is a Relation as to moral Purposes, therefore he cannot marry his own Mother or Bastard Sister.

Bill of Exceptions. See Evidence 10.

Bills of Exchange. See Executor 10. Infant 12.

See Mr. Cunningham's excellent Treatise on Bills of Exchange, and Promissory Notes per totum.

Nicholson *versus* Seldnith. Pasch. 9 Will. 3. C. B. 1 Ld. Raym. 180.
S. C. named Nicholson *v.* Sedgwick.

RULED, that where a Bill is drawn payable to *W. R. or Bearer*, an Assignee must sue in the Name of him to whom it was made payable, and not in his own Name; for if the Bearer was allowed to sue in his own Name, then a Stranger, who by Accident may find the Note, if lost, might recover: But if 'tis made payable to *W. R. or Order*, there an Assignee may sue in his own Name, because the Order must be made by Indorsement, or the like, to shew the Drawer's Consent. (1) Difference between a Bill payable to *W. R. or Bearer*, and to him or Order.

Jordan *versus* Barloe. Pasch. 12 Will. 3. B. R.

RULED, that where a Bill is drawn payable to *W. R. or Order*, 'tis within the Custom of Merchants, and such a Bill may be negotiated and assigned by Custom, and the Contract of the Parties, and an Action may be grounded on it, though * 'tis no Specialty; but if 'tis made payable to *W. R. or † Bearer*, 'tis not within the Custom of Merchants, and therefore, when, upon such a Bill, the Plaintiff declared, that the Defendant being a Merchant, had drawn a Bill according to the Custom of Merchants, but had not paid the Money; this Declaration was held ill; and all this was resolved in * *Hodges and Steward's Case*. (2) Bill payable to *W. R. or Order*, is within the Custom of Merchants. * P. 68 † Poitea 5. * 1 Salk. 125. Poitea 5.

Williams *versus* Feild. 5 Will. 3. B. R.

RULED, that where a Bill is drawn payable to *W. R. or Order*, and he indorser it to *B.* who indorser it to *C.* and he indorser it to *D.* the last Indorsee may bring an Action against any of the Indorsers, because every Indorsement is a new Bill, and implies a Warranty by the Indorser, that the Money shall be paid. (3) Where the last Indorsee may bring an Action against any of the Indorsers.

Clerke *versus* Mundall. 3 Will. 3. *apud* Guildhall, *coram* Holt Ch. Just.

W. R. having a Bill of Exchange, and being indebted to *T. P.* indorser the Bill to him; afterwards he brought an *Assumpsit* against *W. R.* and upon *Non Assumpsit* pleaded, at the Trial he gave Evidence this Bill of Exchange indorser to the Plaintiff, and that it had been so long in his Hands after it became due and payable, and therefore he accounted it as Money paid: But *per Holt Ch. Just.* a Bill, without Payment of the Money, shall never go in Satisfaction of a precedent Debt or Contract; if 'tis not Part of the Contract, that it should be in Satisfaction; as if *A.* sells Goods to *B.* and 'tis agreed between them, that *A.* shall have a Bill of Exchange in Satisfaction for the Goods, in such Case *B.* is discharged, though the Money should never be paid, because the Bill itself was Payment; but otherwise a Bill shall never extinguish a precedent Contract or Debt; 'tis true, if Part of a Bill of Exchange is paid, it shall only be a Discharge of so much of the old Debt. (4) Where a Bill indorser and not paid will not extinguish a precedent Debt.

Bills of Exceptions.

Hodges *versus* Steward. Pasch. 5 Will. 3. B. R. 1 Ld. Raym. 181.
this Case cited.

(5)
1 Salk. 125. The Plaintiff declared on a Custom for the Bearer, to bring an Action, if the Defendant demurs and doth not traverse the Custom, Judgment shall be against him.
* P. 69

THIS Case is reported in 1 Salk. to which may be added, that this was an Action on the Case brought upon an *Inland Bill* of Exchange, in which the Plaintiff declared upon a *special Custom* in London for the Bearer, to bring the Action, &c. and upon a Demurrer to the Declaration, besides the other Points adjudged in this Case it was held, that the * Defendant having demurred, without traversing the Custom, he had thereby confessed there was such a Custom, though in Truth there was not, and for that Reason the Plaintiff had Judgment; for though the Court takes Notice of the *Law of Merchants*, as Part of the Law of *England*, yet they cannot take Notice of the Customs of particular Places; and this Custom, as set forth in the Declaration, being sufficient to maintain the Action, and the Defendant confessing it by his Demurrer, he hath given Judgment against himself.

Brough *versus* Parkins. Mich. 2 Annæ, B. R. 2 Ld. Raym. 992.
S. C. 1 Salk. 131.

(6)
Mod. Cases 80. Case against the Drawer of an Inland Bill good, without a Protest.
* 9 & 10 Will. 3. cap. 17.

CASE upon an *Inland Bill* of Exchange brought in the C. B. against the Drawer, and Judgment for the Plaintiff by *Nil dicit*; and now upon a Writ of Error in B. R. it was argued for the Plaintiff in Error, that the Declaration was ill, because it did not appear therein that the Bill was *protested*; and since the late * Statute, no Action can be brought against the Drawer, unless a *Protest* is made as directed by that Statute, and this ought to be set forth in the Declaration, because at Common Law the Party had no Remedy against the Drawer, except Notice was given to him of Non-payment of the Money by him on whom the Bill was drawn; so that now a *Protest* is necessary, or 'tis not; if 'tis necessary, it ought to be set forth in the Declaration; if 'tis not necessary, then the Party had the same Remedy before the Statute that he hath now, so that the Statute is of no Effect; on the contrary it was argued for the Plaintiff in the Action, that it doth not appear that the Bill was underwritten; for if it was not, then 'tis not within the Statute, and a *Protest* cannot be made without it; for in Cases of *Inland Bills*, a *Protest* was not necessary at Common Law, as 'tis in Foreign Bills, but admitting a *Protest* in this Case is required by the Statute, yet it ought not to be set forth in the Declaration, but 'tis to be considered at the Trial; for if the Drawer had any Damage by the not protesting it, and if such Damage amounts to the Value of the Bill, 'tis a total Discharge to him, if less, 'tis a Discharge for so much: *Holt Ch. Just.* The Plaintiff must give convenient Notice to the Drawer of Non-payment of the Money in Cases of *Inland* as well as of *Foreign Bills of Exchange*, for if the Drawer receives any Prejudice by the Plaintiff's Delay, he shall not recover; a *Protest* on a *Foreign Bill* is Part of its Constitution, but on *Inland Bills* it was not necessary before this Statute, at Common Law; and the Statute doth not take away the Plaintiff's Action for Want of a Protest, or make it a Bar to his Action, but only deprives him of that Interest, or those Damages for not making a Protest, as he might have, if * he had made one; or to give the Drawer a Remedy against him by Way of Action for Costs and Damages, in not making a Protest, *quod Powell Just. concessit*, and that since the Statute a Protest was never set forth in the Declaration.

* P. 70

Yeoman versus Bradshaw.

(7)
Postea, Executor 10. Bill of Exchange is no Specialty, therefore it shall be *Bona notabilia* where the Debtor is, and not where the Bill is.

PER *Holt Ch. Just.* a Bill of Exchange shall be *Bona notabilia* where the Debtor is, and not where the Bill is, for 'tis in Law no Specialty; for if an Executor pays Debts upon simple Contracts, or suffers Judgment to pass against him upon Actions on such Contracts, yet he may plead such Payment or Judgment in Bar to an Action on a *Bill of Exchange*, and such Bill is like an Award in

Bishop.

in Writing, which is no Chattel where the Award it self lies, and in Pleading such Award or a Bill of Exchange, 'tis never said *hic in Curia prolat'*, which shews they are no Specialties, and so it was adjudged; though it was objected, that the Paper on which it was written was Evidence that it was a Debt, and that Trover and Conversion would lie for it, and consequently it must be Goods and Chattels, and therefore ought to be considered as *Bona notabilia*, where the Bill or Award was.

Anonymous. Pasch. 2 Annæ. B. R.

(8)
A Bill of Exchange was drawn on *W. R.* for 40 *l.* payable to *O. W.* or Order; *W. R.* accepts the Bill, and afterwards *O. W.* the Drawer indorses *Part* of it to the Plaintiff, who brought an Action against the *Acceptor*; adjudged, that it would not lie, because, by his accepting the Bill, he made himself liable only to one Action for the Whole, and not to several Actions for Part of the Money. Action against the Acceptor, where brought for Part of the Money, not good.

Anonymous. Mich. 10 Will. 3.

(9)
A Bill of Exchange being made payable to *W. R. or Order*, *W. R.* indorses it, *B.* the Indorsee cannot sue *W. R.* unless he attempt to find out the first Drawer, or to demand it of him, for the Indorser is but a Warrantee that the Drawer should pay, and therefore liable only upon his Default: *Per Holt* Chief Justice, at *Guildhall*, and such Attempt must be set forth in the Declaration. Action doth not lie against the Indorser, without setting forth an Attempt to find out the first Drawer, or a Demand of the Money of him.

Anonymous. Mich. 10 Will. 3. at Guildhall.

* P. 71
 (10)
A Bank Bill, payable to *W. R. or Bearer*, was given to *W. W.* who lost it, and it was found by a Stranger, who assigned it to *C.* upon a Valuable Consideration; afterwards *C.* got a new Bill in his own Name. *Et per Holt*, Ch. Just. *W. R.* may have Trover against the Finder, for he had no Title, though a Payment to him had indemnified the Bank; but not against *C.* because of the Consideration, which, by Course of Trade, creates a Property in the Assignee or Bearer. Bill payable to Bearer lost, and found by a Stranger, who assigned it to *C.* good, but Trover lies against the Finder.

Bishop.

(1)
A L L Bishopricks in *England* were anciently *Donative* by the King; and there was good Reason for it, for he endowed them with Lands and Revenues, and Baronies, and therefore it was reasonable he should be the Patron. The Ceremony then in Use, was Investiture *per Annulum & Baculum*; the one was a Symbolical Representation of the Bishops Spiritual Marriage with the Church, the other of his Pastoral Care and Charge over the Flock of Christ.

(2)
 But after many Contests between the Kings of *England*, and the Popes, it was agreed, in the Reign of *King John*, That the King should permit a free Election by the Chapter, but founded on his *Conge d'eslire (i. e.)* a Licence to give them Leave to choose a Bishop upon any Vacancy, and that the new elected Bishop should not have his Temporalties, till he swore Allegiance to the King; but that Confirmation and Consecration should be in the Power of the Pope, by which Means he gained, in Effect, the Disposal of the Bishopricks in *England*. * The Original Charter of this Agreement is in Mat. Paris and in Eadmerus.

(3)
 And thus it continued till the * 25th Year of the Reign of *H. 8.* in which Year the Papal Jurisdiction was taken away by Statute. *Quod, Vide.* 25 H. 8. cap.

After-

Bishop.

(4)

1 Ed. 6. cap. Jones 160. Latch 37.

* P. 72

Afterwards by the Statute 1 Ed. 6. All *Bishopricks* were made *Donative*, as formerly they were; but by a Statute made * 8 Eliz. the Statute 25 H. 8. was restored, and *Bishopricks* in *England* were again made *Elective* by the *Conge d'eslire*; but in *Ireland* they are *Donative* by Letters Patent at this Day.

(5)

The Manner of making a Bishop, as well in Case of Translation as new Creation, is thus;

When the See is Vacant, the Dean and Chapter certify it to the King in Chancery, and pray the King's Licence to elect a Bishop; thereupon the King grants his *Conge d'eslire* such a Person naming him, and so they proceed to an Election; and when that is done, they certify it to the King, to the Archbishop, and to the Party elected, and then the King by his Letters Patents gives the Royal Assent, and Commands the Archbishop to confirm and consecrate him; whereupon the Archbishop examines the Election, and the Party, and then confirms the Election, and consecrates him.

(6)

* Jones 160.

This is the Manner of Proceeding in *Creations*, and it holds likewise in Cases of *Translations*, excepting only, that the Person translated is not consecrated *de novo*; for a * Consecration is like an Ordination (*i. e.*) 'tis an indelible Character, and holds good for ever.

(7)

Jones 160.

Heretofore, when a Bishop was to be *translated*, there was no Election to the new See, for the Rule in the Canon Law is, *Electus non potest eligi*; and because it was pretended, that the Bishop was married to the first Church, which Marriage could not be dissolved but by the Pope, therefore a Petition was made to him, who consenting to it, then, and not before, the Bishop was translated to his new See; and this was said to be by Postulation, but rather it may be said to be by Usurpation, for 'tis expressly against, the Statutes 16 R. 2. and 9 H. 4. cap. 8. and Translations are ever by Election, and not by Postulation.

(8)

Jones 162.

When a Bishop is *translated*, the old See is not void by the Election to the new one, until the Election is confirmed by the Archbishop; for though he is elected, yet the King may not consent, or the Archbishop may not confirm, and 'tis not reasonable that the Bishop should lose his old Preferment, till he hath gained a new one; and so 'tis in Case of Creation, he is not completely Bishop till Consecration.

(9)

+ See Serjeant Wilfon's Argument, in the Case of Wolferston versus The Bishop of Lincoln. 2 Wilfon, 181.

* P. 73

For, as there are four Things to complete a Parson (*viz.*) *Presentation*, *Admission*, *Institution* and *Induction*, so there are four Things analogically requisite to complete the Bishop; the first is *Election*, and this resembles the *Presentation*; the next is *Confirmation*, which resembles *Admission*; the next is *Consecration*, and this resembles *Institution*; and the last is *Installation* of a Bishop, or *Intbronization* of an Archbishop, which resembles *Induction*.

(10)

Originally the Archbishop was Bishop over all *England*, as *Auston* was, *per Coke* and *Dodderidge*. 1 Roll. Rep. 328.

(11)

Seld. Tit. Honour 576.

Bishops did sit and had a Vote in Parliament in the Time of the *Saxons*, but it was not *ratione Baronie* but *ex Privilegio personali*, as they were Bishops, for they were not *Barons* till the *Norman Reign*; for in the Reign of the *Saxons*, they were free from all Services and Payments, excepting only to *Castles and Bridges*; but *William*, called the *Conqueror*, deprived them of this Exemption, and instead thereof turned their Possessions into Baronies, and made them subject to the *Tenures* and Duty of Knights Service.

Bona Notabilia. See Executor 10.

Bonds.

Cromwell versus Dresdale. Mich. 8 Will. 3.

P E R Holt Ch. Just. If the Delivery of the Bond was after the Date, the Plaintiff must declare generally of a Bond dated on such a Day, but with a *primo deliberat* on such a Day, for otherwise it shall be intended to be delivered on the Day 'tis dated. (1) Where the Plaintiff must declare on the Delivery of a Bond after the Date

* **Henderson versus Foster.** Hill. Will. 3. B. R.

* P. 74

IN an Action of Debt, the Plaintiff declared on a Bond *solvend' triginta & sex libras*; and upon Oyer of the Bond it appeared, *solvend' sex triginta libras*, which is six Times as much as the Plaintiff had declared for (*viz.*) 180 l. and for this Variance the Defendant demurred to the Declaration, but it was held good; for *sex trigint'* shall be taken as one Word, like a Bond dated *tres viginti dies*, which was taken to be on the 23d Day, &c.

(2) Where sex triginta shall be taken as one Word.

Boughton versus Shaw. Pasch. 5 Will. 3.

D E B T upon Bond conditioned, that whereas *W. R.* was arrested at the Suit of the Plaintiff, if therefore he the said *W. R.* should appear and put in Bail at the Return of the Writ, or surrender himself to the Serjeant, then the Bond should be void. The Defendant pleaded the Statutes of *H. 6.* and that this Bond delivered to the Serjeant, and taken by him in the Name of the Plaintiff, was for Ease and Favour; and upon a Demurrer to this Plea, *per Curiam*, a Bond given by the Party arrested, to the Plaintiff himself, or by a Stranger, to the Plaintiff himself, for the Enlargement of the Party arrested, is not within the Statute, but good.

(3) Bond given to the Plaintiff himself to appear, &c. is not within the Statute.

Three Joint Obligors, an Action was brought against two, they may plead in Abatement, that another sealed the Bond, who is still alive, and not named; so 'tis of a Recognisance before a Mayor or Recorder, but they cannot crave Oyer and Demur for Variance, for perhaps all three did not seal, and so the Court will intend; but 'tis otherwise of a Recognisance before a Judge; for in a *Scire facias*, the Defendant may either plead it in Abatement, or crave Oyer and Demur for Variance.

(4) Allen 21, 42. Saund. 291. Jones 303. Sid. 234, 272, 420.

So where there are three Joint Obligors, and one of them dies, the Plaintiff must shew, that one is dead, for otherwise he cannot sue the two Survivors, and the Executor of him who is dead.

(5) Sid. 238.

Where a Bond is made to *A. B.* and *C.* conditioned, that *W. R.* shall pay 20 l. to *W. W.* there all of them must join in the Suit, for they are but as an Oblige; and if one of them should die, the two Survivors must join in the Action, though they have no Interest in the Money.

(6) Yel. 177.

* Two seal and deliver a Bond to *W. R.* and afterwards by Consent of all Parties, Third is added, and he seals and delivers the Bond: adjudged this did not make the Bond void, but that all three are now bound; but it had been otherwise the third Man had been nadded without the Consent of the Oblige.

(7) Lev. 35. * P. 75

By-Laws.

(8)
2 Lev. 166.

Debt upon a Bond of 50*l.* which upon *Oyer* appeared to be in *quanto ginta libris*; adjudged ill, because of the Variance and Insensibility of the Word.

(9)
2 Lev. 220.

Three were jointly and severally bound, and an Action of Debt being brought against one of them alone, he craved *Oyer* of the Bond, and pleaded that the Seal of one of them was torn off; and upon a Demurrer this was adjudged a good Plea, because 'tis not the same Bond as it was at first.

(10)
1 Roll. Rep. 40.

Debt upon Bond, in which the Plaintiff declared, that the Defendant was bound to him the Plaintiff *W. R.* in 50*l.* upon *Non est factum* pleaded, the Jury found the Bond *in hac verba*, and that it was made to *W. R.* and that the Words *nuper Vic. Oxen* were since interlined: *Et per Curiam*, the Interlineation might be material, but it doth not appear to be so, for *non constat*, whether it was to him, or not, *colore Officii*, and therefore the Verdict is for the Plaintiff; but if instead of *Non est factum*, the Defendant had craved *Oyer*, and demurred, then it had been against the Plaintiff for this Variance.

Placket *versus* Gresham. Mich. 9 Will. 3.

(11)
Where a Bond taken by a Sheriff is good, where not.

IN this Case it was held, that where a Sheriff takes a Bond as a Reward for doing a Thing, 'tis void, for it may be to warrant him in the Breach of his Duty, but if 'tis to save him harmless in doing a Thing which 'tis his Duty to do, then 'tis good.

* P. 76

* By-Laws.

(1)
Hob. 211.

IN all Corporations there is a special Clause, by which they have Power to make By-Laws, but such enabling Clauses are needless, because they are included in the very act of incorporating, as a Power to sue, purchase, or the like; for as the natural Body hath Reason to govern it self, so Bodies incorporate must have Laws, which are in Nature of political Reason to govern themselves.

(2)
Hob. 211. 5 Rep. 61.

The Inhabitants of a Town or Parish may make By-Laws for *repairing their Church or Highways*, and this without any *Custom or Prescription* so to do, because these are Necessaries to which the Law hath made them Subject as they are a Parish; and therefore the Law enables them to supply these Occasions, as if they were incorporated; but they cannot make a By-Law for *regulating a Common*, without a Custom enabling them so to do, and such Custom must be pleaded.

(3)
1 Vent. 167.

But a By-Law in a *Manor* binds all the Tenants of that Manor, because they are supposed to dwell there.

(4)
1 Roll. Rep. 3.

A By-Law that none shall exercise his Trade in such a Vill, until first allowed so to do by such or such Persons, is not good, because 'tis in the Power of these Persons to hinder him.

(5)
1 Roll Rep. 312.

But a By-Law in *London* not to use a *Hot Press*, under the Penalty of 5*l.* nor to make one under the Penalty of 10*l.* is good, because 'tis dangerous in respect of firing, and 'tis a Deceit to the Buyers.

(6)
2 Vent. 183,

A By-Law under such a Penalty, and whosoever shall refuse to pay it, to be committed, is naught, because *nullus liber homo imprisonetur nisi per legale iudicium*, and no Assent can change this Law; but if the By-Law had been, that the Penalty should be levied by Distress, an Action of Debt would have laid. 5 Rep. 64. Clerk's Case, but not to be levied by Distress and Sale of Goods.

The

Bridges.

The Town of *Boston*, by their Charter, claimed a Power to make By-Laws or Orders, and to *commit* for not obeying * them; and this in a *Quo Warranto* was held to be ill, according to *Clerk's Case*. Jones 162. (7)
* P. 77

All By-Laws must be subject to the Laws of the Realm, and subordinate to them; therefore, if they are against the Laws and Statutes, they are void. Hob. 211. (8)
5 Rep. 63,

Bridges.

THESE are to be repaired by the County, unless the *Locus in quo*, &c. is bound to repair it, and that may be by *Toll* or *Tenure*, but not by *Prescription*; but if it lie Part in one County and Part in another, each County is respectively chargeable for so much of the Bridge as lies therein, and that may be by *Toll*, *Tenure*, or *Prescription*, or unless some private Person is bound to repair it, and that may be by *Toll* or *Tenure*, but not by *Prescription*. (1)

Indictment for not repairing a Bridge was adjudged naught, because *non constat* in what County it lies, and because it did not set forth what Kind of Bridge, (viz.) whether *Foot*, *Horse*, or *Cart Bridge*, and because it charged the Defendant *ratione Manerii sui*, when it should be *ratione tenuræ Manerii sui*, so that it did not appear that he was Owner of the Manor. Stiles 109. Spiller's Case. (2)

Information against the Inhabitants of the County of *Nottingham*, for not repairing a Bridge over the *Trent*, two of the Inhabitants, in the Name of themselves and the rest, pleaded, that *A.* and *B.* Owners of *Whiteacre*, ought to repair it *ratione tenuræ*, and traverse, that the Inhabitants of the County have or ought to repair; the Attorney-General replied, that the Inhabitants, &c. ought to repair it, and traversed that *A.* and *B.* ought; they rejoin, that *A.* and *B.* ought to repair, and thereupon they were at Issue; and at a Trial by a *Middlesex* Jury, the Defendants were found guilty upon the last Traverse, *quod nota*. 2 Lev. 112. (3)

The Defendant, as Lord of a Manor, used to repair *Lodden-Bridge*, he aliened the Manor to several, (viz.) Part to *A.* and Part to *B.* and afterwards *B.* was indicted for not repairing this Bridge as he ought *ratione tenuræ*, he pleaded, that *A.* and the other were Purchasers with him of the same Lands held of that Manor: *Sed per Curiam*, we will compel you to repair this * Bridge, because 'tis a Thing of Necessity, and afterwards you may seek for Contribution amongst the rest, for the repairing shall not stay till you determine who shall be Contributors. Jones 273. * P. 78

Certiorari.

The Queen *versus* Dixon. Mich. 2 Annæ. B. R. 2 Ld. Raym. 971.
S. C.

THERE is a short Note of this Case in 1 *Salk.* which see, the Case was thus: (1)
1 *Salk.* 180. Mod. Cases 61.
II. The Defendant was indicted for selling five Yards of *Muslin*, affirming it to be worth 5 s. per Yard; whereas it was not worth 2 s. 6 d. per Yard; upon Not guilty pleaded, the Defendant was found guilty, and afterwards brought a *Certiorari*, and moved to quash this Indictment: *Sed per Holt Ch. Just.* This *Certiorari* was only to remove the Indictment and not the Conviction; besides, here *Certiorari* to remove the Indictment, but not the Conviction.

Certiorari.

here is no Day in Court for the Defendant, as it ought to be upon the Return of a *Certiorari*, to remove an Indictment *after Conviction*, he should have made Use of this *Certiorari*, *before Conviction*, whereupon he now moved for a *Certiorari* to remove both the Indictment and *Conviction*, though a *Writ of Error* might have been proper, yet the Court granted a *Certiorari* specially giving a Day here by it to the Party.

The Queen *versus* Brown & al'. Mich. 12 Annæ, B. R.

(2)
Joint Indictment against 3, another Indictment against one of the 3, and another against 2 of the 3 and a Stranger, and a *Certiorari* to remove all Indictments against the Three, without saying, *vel eorum aliquis*.

* P. 79

WILLIAM Brown, Francis Wood, and Leonard Fosbrook, were jointly indicted at the Sessions; there was another Indictment against Brown alone, and another against Wood and Fosbrook, and one *W. R.* and a *Certiorari* was awarded to remove all Indictments, *Unde iidem Willielmus, Franciscus & Leonardus indictati sunt*, without saying, *vel eorum aliquis indictatus existit*: And *per Curiam*, none of these Indictments * are removed, but only that Joint Indictment first mentioned against Brown and others, and the Justices below may proceed on the other without any Contempt.

Anonymous. Mich. 8 Annæ.

(3)
An Order was made concerning Foreign Salt, and the *Certiorari* was to remove an Order concerning Salt.

CERTIORARI to remove an Order made upon *W. R.* concerning Foreign Salt, and the Order being returned, it appeared to be for Salt only; and a Motion being made, to quash the Order for a Fault therein, the Attorney-General Northey objected against the *Certiorari*, that it was misconceived, for there was no such Order to be removed, *quod Curia concessit*; for a *Certiorari* to remove an Order made concerning Foreign Salt, will not remove an Order made concerning Salt generally, it should have been to remove all Orders concerning *W. R.* for which Reason it was quashed.

Croffe *versus* Smith. Hill. 1 Annæ. B. R. 2 Ld. Raym. 836. S. C.

(4)
1 Salk. 148. S. C. No Jurisdiction can withstand a *Certiorari*.

UPON a *Certiorari* out of the Common Pleas to the Court of *Ely*, and this Writ being allowed by the Court, and they afterwards proceeding thereon, a Writ of Error was brought, and that Matter was assigned for Error. The Defendants plead a Grant of *Consuance of Pleas to the Bishop of Ely*, and an Allowance thereof in *B. R. Anno 21 Ed. 3.* and that the Cause did arise within that Jurisdiction; and this being returned on the *Certiorari*, and a Demurrer to it, Holt Chief Justice, held, that there are three Sorts of Inferior Jurisdic-tions.

1. One whereof is *Tenere placita*, and this is the lowest Sort, for 'tis only a con-currant Jurisdiction, and the Party may sue there, or in the King's Courts if he will.

2. The second is *Consuance of Pleas*, and by this a Right is vested in the Lord of the Franchise to hold the Plea, and he is the only Person who can take Advantage of it; for the Defendant cannot plead this to the Jurisdiction of the Court, but the Lord must come in and claim his Franchise, and there is no other Way to get the Cause from him; neither is the Court of *B. R.* entirely outed thereupon, for Day is given by the Roll in *B. R.* to the Party to be below at such a Day, where both Parties are sent down together, with the Tenor of the Record here, for them to proceed there; and if Justice is done 'tis well, if not, the Plaintiff shall have a Resummons for any Delay or Misbehaviour below, for the Cause is still under the Authority and Inspection of this Court, and the Lord's Benefit is all that is to be considered; 'tis true, these Jurisdic-tions are a Grievance, and * Complaints have often been made against them, and the Com-mon Law, to prevent Oppression, hath always allowed *Certiorari*'s to these Jurif-dic-tions.

3. The third Sort is an *Exempt Jurisdiction*; as where the King grants to a great City, that the Inhabitants thereof shall be sued within their City, and not else-where, this Grant may be pleaded to the Jurisdiction of this Court, if there be a Court within that City which can hold Plea of the Cause, and no Body can take

27 H. 8. cap. 24.

* P. 80

Challenges.

take Advantage of this Privilege but a Defendant, for if he will bring a *Certiorari*, that will remove the Cause; but he may waive it if he will, so that the Privilege is only for his Benefit.

Thus there is no Jurisdiction which can withstand a *Certiorari*, even in a Case of a Customary Proceeding by Foreign Attachment; if the Defendant cannot find Bail below, he may bring a *Certiorari*, and upon putting in Bail above, the Cause shall go on there.

Parish of St. Mary in Devises. Pasch. 1702.

UPON a *Certiorari* to remove an Order, the Return was, *Cujus quidem* ^(5) *Certiorari* to remove an *tenor sequitur in hæc verba*, when it should be *Qui quidem ordo sequitur in hæc* Order *tenor*, *verba*, and for that Reason it was quashed, and upon Motion, a new *Certiorari* instead of *ordo*, not good. was grand.

The Queen *versus* Whittle. Pasch.

CERTIORARI to remove an Order of Sessions, was superseded, because ^(6) *Certiorari* to remove an *Emanavit biduo antea aliquid fiat* was signed by a Judge; for *per Curiam*, if it Order, need not be signed be to remove an Indictment, both *Certiorari* and *Fiat* ought to be signed, if to by a Judge, but the *Fiat* remove an Order, the *Certiorari* need not be signed, but the *Fiat* must.

Anonymous.

CERTIORARI to remove an Indictment *de duobus equis felonice abductis*, ^(7) Variance between the In- and the Indictment was, *de uno equo furtive abducto*; *per Curiam*, nothing is dictment. the *Certiorari*. before the Court, neither have they any Warrant to proceed in this Case, for Antea 3. there is a Variance between the Indictment and the Writ.

* Challenges.

* P. 81

Charnock's Case.

CHARNOCK, King and Key's, were indicted for *High Treason*, in conspiring ^(1) Where three may join, or the Death of the King; they were denied Counsel, but allowed *Pen, Ink* and sever in their Challenge. *Paper*, and having severally pleaded Not guilty, *Holt Ch. Just.* told them, that each of them had Liberty to challenge *thirty-five* of those who were returned upon the Panel to try them, without shewing any Cause; but that if they intended to take this Liberty, then they must be tried separately and singly, as not joining in the Challenges, but if they intended to *join in the Challenges*, then they could challenge but thirty-five in the whole, and might be tried *jointly* upon the same indictment; accordingly they all three joined in their Challenges, and were tried together and found guilty.

Anonymous.

RULED, that where there is a Writ of Inquiry for Damages, the Jurors ^(2) Jurors in a Writ of In- cannot be *challenged*, as other Jurors may, because this is only an Inquest quiry cannot be challen- of Office; but yet 'tis in the Discretion of the Sheriff to admit such a Challenge, ged. if it appear to be a good Cause of Challenge.

Challenge to the Array, for that the Sheriff had not taken the *Test*. ^(3) *Sed per* 2 Vent. 58. 1 Cro. 369. *Curiam*, this is no good Cause of Challenge, for he is still Sheriff *de facto*, and it would be very hard for Plaintiffs in every Trial to prove, that the Sheriff had taken the *Test*.

Chancery.

(4)
1 Vent. 366.

When the Jury are of a Town Corporate, 'tis no Challenge, that they are not Freeholders ; but where they are not of any Corporation, tis a good Challenge.

(5)
1 Vent. 309. 1 Cro.
663.
* P. 82

Information against the Defendant for *Forgery*, one of the Jurors was challenged, for that the Prosecutor was lately * entertained at his House, and this was allowed a good Challenge to the Favour.

(6)
1 Cro. 413. Sir Christo-
pher Blount's Case.

Information of Intrusion, a Juror was challenged for want of *Freehold*, he having only 15 s. *per Annum*: But *per Curiam*, any Freehold was sufficient at Common Law ; and though the Statute of H. 5. requires 40 s. and the 27 Eliz. 4 l. where the Damages exceed 40 Marks, yet this is only between Party and Party, and not where the Queen is concerned.

Chancery.

Mathews *versus* Courthope.

(1)
The Testator made a
Stranger, and no Relation
to him, Executor, and
gave him 50 l. he shall
not have the Residuum.
See 1 Wilfon. 285.

THE Testator made one Executor, who was no Relation to him but a mere Stranger, and gave him 50 l. for his Care in the Execution of his Will ; the Plaintiff being next of Kin, exhibited his Bill for the *Residuum* of the Estate, and no Counsel appearing on the other Side, he had a Decree *nisi causa*. For *per Turton* Just. with whom the Bar agreed, the Executor in such Case shall not have the *Residuum*, after Debts and Legacies paid, but the next of Kin to the Testator ; and so it was said it had been decreed in the like Case, between *Cordall* and *Cordall* ; 'tis true, if the Executor had been nearly related to the Testator, it might have been otherwise ; but even in such Case, if there are other Relations, in equal Degree with him, and are poor and indigent, Equity in such doubtful Cases, will give the *Residue* amongst them.

Aston *versus* Adams. Pasch. 8 Will. 3.

(2)
Prohibition to the Plain-
tiff in Chancery, who had
brought a Bill on an Inde-
bitatus Assumpsit.
* P. 83

MOTION for a Prohibition to one *Adams*, who had exhibited a Bill in Chancery: The Case was thus ; *Aston* stood engaged to *Adams* by Simple Contract, to pay him 10 l. for curing his Son, &c. and *Adams* brought a Bill in Chancery * for this 10 l. suggesting that the Agreement was *not in Writing*, and that the Witnesses who could prove it were either *dead or beyond Sea* ; the Defendant *Aston* pleaded, that the Agreement was made in the Presence of *W. R.* now living in *Holland*, and traversed the rest of the Suggestion ; and this being overruled in Chancery, *Aston* now moved for a Prohibition, because this is no more than a mere *Indebitatus Assumpsit* at Common Law ; and if this Proceeding should be allowed, it would tend to the Subversion of the whole Frame of the Common Law ; besides, the granting a Prohibition would prevent the Clashing of Jurisdiction ; and there are several Precedents in the Register of Prohibitions, *ne sequatur sub suo periculo* : The Court appointed to hear Counsel on both Sides, but the Cause was agreed.

1 Ch. Rep. fo. 63.

Anonymous. Hill. 9 Will. 3.

(3)
Mortgages and Judgments
to be paid by Sale of Lands,
and Bonds and Debt on
simple Contract out of the
personal Estate.

THE Testator being seised of Lands, and possessed of Goods, devised *Black-acre to be sold*, and *White-acre to be mortgaged*, for Payment of his Debts, and died so much in Debt, that if both Parcels were sold, the Money arising by such Sale would only pay the Debts, with a small Overplus, accounting also the Money arising by the Sale of his Goods and Chattels ; in this Case it was decreed, that *all should be sold*, that the Mortgages and Judgments should be first satisfied, and

Chancery.

and that afterwards, if there should be sufficient of the *personal Estate to pay the Bonds*, then to pay the same, or so much of them as the *personal Estate* would extend to pay; and that so much of the Bonds as should remain unpaid, should come in in equal Degree with the Debts upon simple Contract, and be a Charge upon the Lands, for as to them, Bonds have no Preference in a Court of Equity; 'tis true, as to Goods and Chattels, Bonds will have a Preference, because the Executor by Law is bound to prefer them before Debts on simple Contract.

Feverstone *versus* Scetle. Hill. 1697.

DECREED by Somers Lord Chancellor, that where a real Estate is Debts upon simple Contract to be satisfied out of the equitable Estate.⁽⁴⁾ upon an *equitable Title*, made subject by this Court to the Payment of Debts, and it appears that there is a sufficient *legal Estate*, (*i. e.*) *Goods and Chattels*, to satisfy Debts upon Specialties, for which the Creditors may have Remedy at Law against the Executor; in such Case the Debts upon simple Contract, for which there is no Remedy at Law, shall be first satisfied out of the equitable Estate.

* Pope & al' *versus* Garland. * Pasch. 11 Will. 3.

* P. 84

DECREED, that all Devises by Copyholders, for the Use of Children Devise of Copyhold good without a Surrender.⁽⁵⁾ or Creditors, and all Charges made by them upon their Lands, for the Benefit of Children or Creditors, will be good in a Court of Equity, though there was no Surrender to these Uses.

Phillipson *versus* Phillipson. Hill. 3 Will. 3. B. R.

DEBT against an Heir upon the Bond of his Ancestor: The Defendant Where an Heir shall be relieved against the Penalty of a Bond.⁽⁶⁾ pleaded *Riens per Descend*, and at the Trial it was found against him, that he had 5%. *Assets per Descend*, the Chancery will relieve him against the Penalty of the Bond, but not against the Penalty of his false Plea, because it was a voluntary Falsity.

Anonymous. Hill. 9 Will. 3.

DECREED by Somers Lord Chancellor that where the Mortgagee Where more Money is lent to the Mortgagor, he shall not redeem to the Mortgagor on Bond, till he pays the Bond-Debt as well as the Money due on the Mortgage; but he shall not redeem without paying the Bond.⁽⁷⁾ if he Mortgage his *Equity of Redemption* to another, the second Mortgagee shall not be affected with the Bond, for 'tis but a personal Charge upon the Mortgagor.

Anonymous.

A Bill was exhibited against Husband and Wife, for Matters chiefly concerning the Wife, they both put in their Answer, and then the Husband died, this is an Abatement of the Cause, so that the Plaintiff shall not proceed of him.⁽⁸⁾ upon a *Bill of Revivor*, for the Widow shall not be compelled to abide by the Answer of her Husband made for her, or which he made whilst she was *sub potestate Viri*, but she may abide by it if she will, and if she doth, the Plaintiff may proceed, and the Decree shall bind her.

* Anonymous.

* P. 85

A BILL was exhibited to discover a Title, and whether there was an Equity Purchase for a valuable Consideration without Notice of any Incumbrance, a good Plea.⁽⁹⁾ of Redemption, the Defendant answered, that he was a Purchaser for a valuable Consideration, and absolutely bought the Estate of such a Person, and had no Notice of any Title; and this was adjudged a good Plea. See *Hardres* 510.

Daris's

Church and Churchwardens.

Daris's Case.

(10)
Contract for a Purchase,
and before the Convey-
ance made he died, the
Vendor is a Trustee for
the Vendee.

A MAN contracted for the Purchase of Lands, but before the Conveyance was made *he died*, having devised the Land, &c. *Et per Curiam*, the Devise is good, because the Vendor, after the Contract stood Trustee for the Vendee.

Church and Churchwardens. See Dr. Burn's Justice. Titles Church and Churchwardens.

(1)
Seats in the Church.
Sid. 88, 203.
1 Lev. 71. 1 Wilfon 326.

IN a Prohibition it was ruled, that the Plaintiff cannot intitle himself to a *Seat in navi Ecclesie* by Prescription generally, without shewing some Special Matter, as *Repairing*, &c. otherwise if it be an *Isle*, but if he intitle himself to a *Seat in navi Ecclesie* generally, he must give *repairing* in Evidence, but an *Isle* may be upon the Land of a private Person.

(2)
Noy 108. Gibfon's Case.

In Trespafs for breaking and cutting in Pieces his Pew, and taking it away; the Defendants pleaded, that they were *Churchwardens*, and that the Plaintiff had built it in the Church without License, *per quod*, &c. *Et per Curiam*, the Trespafs is confessed, for though they may remove the *Seat*, they cannot cut the Timber and Materials into Pieces.

(3)
Noy 104. Day's Case.

If one and his Ancestors have, Time out of Mind, repaired an *Isle in a Church*, and sate there with his Family, and buried there, 'tis good Evidence that the *Seat* is proper and peculiar to him, but then he must repair it at his own Charge, and not * with the Help of the Parish, for if he doth not, the Ordinary may appoint who shall sit there.

* P. 86

(4)
Noy 133. Sir W. Hall's Case.

The chief Seat in the Chancel belongs to the Impropiator of common Right; and by Consequence to the Farmer of the impropriate Tithes, but by Prescription it may belong to another.

(5)
Burials. Noy 145.

The Church Book for Burials and Christenings began in the thirtieth Year of H. 8. at the Instance of the Lord Cromwell.

(6)
Noy 104.

The Ordinary and Churchwardens cannot licence one to bury in the Church; but it ought to be by the Parson, because the Freehold is in him.

Anderton versus Walker.

(7)
2 Lutw. Custom to pay for
Baptism and Burials,
triable at Law. * Cap. 13.

ALL Offerings which are due to the Vicar for *Sacraments, Marriages*, and *Burials*, and payable to him by the *Laws and Customs* of the Realm, are confirmed by the Statute * 2 Ed. 6. but then such Custom must be tried in the Temporal Courts; therefore, where the Curate of *Bridlington* libelled against T. S. for not paying a Shilling for *baptizing* his Child, setting forth in his Libel a Custom in the said Parish for every Parent so to do, &c. the Defendant suggested for a Prohibition, that by Law no Man ought to pay for baptizing his Child, &c. against his Will, that Customs and Prescriptions were properly triable at Law, and that the Curate, &c. had libelled against him, &c. setting forth the Custom as aforesaid, and a Prohibition was granted.

Thompson

Church and Churchwardens.

Thompson *versus* Davenport.

SO where the Plaintiff libelled against the Defendant, setting forth a *Custom* in the Parish of *Elington* in *Derbyshire*, that every Woman, who is a Parishioner, and dwelleth there, and marrying with a *Licence*, their Husbands at the Time of the Marriage, or soon after, shall pay to the Vicar 5 s. as an accustomed Fee, and so brings his Case within that Custom; the Defendant suggested for a Prohibition, that all Customs are triable at Common Law, and that the Plaintiff had libelled against him, setting forth the Custom as aforesaid, &c. and a Prohibition was granted.

(8)
2 Lutw. Custom to pay Money for marrying, triable at Law.

Parker *versus* Clerke.

THE Clerk of a Parish libelled against the Churchwardens, for so much Money due to him by Custom every Year, and to be levied by them on the respective Inhabitants in the said Parish, and after Sentence in the Spiritual Court, the Defendants suggested for a Prohibition, that there was no such Custom as the Plaintiff had set forth in his Libel; it was objected, against granting the Prohibition, that it was now too late, because it was after Sentence, especially since the Custom was not denied; for if it had, and that Court had proceeded, then, and not before, it had been proper to move for a Prohibition. But *per Holt Ch. Just.* 'tis never too late to move *B. R.* for a Prohibition, where the Spiritual Court had no Original Jurisdiction, as they had not in this Case, because a Clerk of a Parish is neither a Spiritual Person, nor is this Duty in Demand Spiritual, for 'tis founded on a Custom, and by Consequence triable at Law; and therefore the Clerks may have an Action on the Case against the Churchwardens, for neglecting to make a Rate, and to levy it, or if it had been levied, and not paid by them to the Plaintiff.

* P. 87

(9)
Mod. Cases 252. Where the Spiritual Court hath not an Original Jurisdiction, 'tis never too late to move for a Prohibition.

The Churchwardens of St. Bartholomew's Case. Mich. 12 Will. 3. B. R.

ONE Fishburne left 25 l. per Annum, for the Maintenance of a Weekly Lecturer, and appointed, that the Lecturer should be chosen by the Parishioners, and to preach on any Day in every Week as they should like best. The Parishioners fixed on Thursday, and chose a Lecturer every Year; and now Mr. Turton being Lecturer, and the Parish having chosen Mr. Rainer, the other would not submit to the Choice, whereupon the Churchwardens shut Turton out of the Church; afterwards the Bishop of London determined in his Favour, and granted an Inhibition and Monition for that Purpose. And *per Holt Ch. Just.* a Prohibition was granted to try the Right; 'tis true, a Man cannot be a Lecturer without a Licence from the Bishop or Archbishop; but their Power is only as to the Qualification and Fitness of the Person, and not as to the Right of the Lectureship, and the Ecclesiastical Court may punish the Churchwardens, if they will not open the Church to the Person, or to any one acting under him, but not if they refuse to open it to any other.

(10)
The Archbishop or Bishop must licence a Lecturer, but they cannot determine his Right to the Place.
1 Wilson 11.

* The Queen *versus* Guise. Mich. 2 Annæ. 2 Ld. Raym. 1008. S. C. * P. 88

A Mandamus was granted to swear two debite electi Churchwardens of, &c. The Return was, that they were not duly elected, but did not say, *nec aliquis eorum*, and for that Reason it was quashed, for he who makes the Return must comply with the Writ as far as he can, and if one of the two is duly elected, as where the Parish claims a Right to choose one Churchwarden, and the Parson another, they ought to swear one, and to return the Special Matter as to the other; that if the Parishioners have only a Right to choose one, and they choose two, the Election is void; but if two are chosen by the Parish by equal Voices, when they ought to choose but one, in such Case they cannot tell which to swear

(11)
6 Mod. 89. Return of a Mandamus, that the Churchwardens were not debite electi, without saying nec eorum aliquis, not good. 2 Stra. 1045.

Church and Churchwardens.

swear into the Office, but then they may return all this Special Matter; so if the Parishioners are to choose and present them to the Parson who is to choose one of them, and they both bring a *Mandamus*, that Matter may be returned, for they cannot tell which to swear.

Britton *versus* Standish. Trin. 3 Annæ.

(12)

Mod. Cafes 182. 1 Salk. 166. S. C. A Parishioner is not bound to come to his own Parish Church, if he goes to any other.

* 1 Eliz. cap. 2 Par. 14. Linw. 8, 143, 184, 227. Spar. 78. 3 Jac. 1. cap. 4. Par. 27. Spelm. Concil. 1 Part 193. 2 Part 141. 1 And. 138. 2 Cro. 480.

* P. 89

2 Roll. Rep. 455. Hard. 406, 407, 503.

STANDISH, the Parson of *H.* libelled against *Britton*, for not coming to his Parish Church on *Sundays*, and for not receiving the *Sacrament at Easter*: The Plaintiff suggested for a Prohibition, that the Bounds of Parishes and the Constructions of Statutes, belonged to the Jurisdiction of the Temporal Courts, &c. The Question was, whether a Parishioner is bound by Law to come to his own Parish Church, or whether he is excused if he go to some other Church, as it appeared the Plaintiff did? It was insisted against the Prohibition, that by the Statute * 1 *Eliz.* every Parishioner is obliged to come to his *Parish Church*, which Statute is still in Force, and not altered by any subsequent Act, but only by the Act of *Toleration* in Respect to Dissenters; on the other Side it was admitted, that the Words of the Statute 1 *Eliz.* are, *that every Parishioner shall repair to his Parish Church*, but that those Words were corrected or explained by some subsequent Statutes; as for Instance, by the Statute * 3 *Jac.* by which every Parishioner is required to repair to his Parish Church, *or to some other Church*; 'tis likewise corrected by the Act of *Toleration*. *Holt Ch. Just.* Parishes were instituted for the Ease and Benefit of the People, and not of the Parson; and if every Parishioner is obliged to go to his Parish Church, then the Gentlemen of *Gray's-Inn* and *Lincoln's-Inn* must no longer repair to their respective Chapels, but to their Parish * Churches, otherwise they may be compelled so to do by Ecclesiastical Censures. But *per Powell Just.* The Spiritual Courts have always exercised this Jurisdiction, and after so long Usage, it ought not now to be questioned, and as for the *Gentlemen of Gray's Inn* and *Lincoln's Inn*, they have likewise used to repair to their Chapels, and therefore may be exempted from coming to their Parish Churches, and this by Virtue of an Usage against Usage: Now the Reason why Parishioners must come to their Parish Churches, is not (as hath been observed) for the Benefit of the *Parson*, or that he may have his Offerings, but because he having charged himself with the Cure of their Souls, he may be enabled to take Care of that Charge. But at another Day, *Holt Ch. Just.* held, that if a Man repaired to any other Chapel, it would be a good excuse for his not coming to his Parish Church, but then he must plead it; he likewise held, that if *Britton* the Plaintiff in this Prohibition, was a professed Churchman, and his Conscience would permit him sometimes to go to the Meetings of Dissenters, that the Act of *Toleration* would not excuse him for not coming to Church, for that Act was not made to give Ease to *such People*; so a Rule was made for a Prohibition, and that the Plaintiff should declare on it, that the Matter might come judicially before the Court.

Harman *versus* Renew. Trin. 7 Will. 3. B. R.

(13)

1 Salk. 165. Of the uniting two Parishes. S. C.

22 Car. 2. cap. 11.

IN this Case, which see in 1 *Salk.* it was held, That at Common Law two Churches might be *united* by the Concurrence of the *Patron*, *Parson* and *Ordinary*; it was farther held, that though in such Case there is but one Parson to both Churches, yet the two Churches remain, and the two Patronages, and the two Parishes: But where they are *united by Act of Parliament*, as in the Principal Case, the Parish of *St. Mary Bothaw* was *per Statute 22 Car. 2. united to the Parish of St. Swithin*, and the Question arising, whether after such Union the Parishioners of *St. Mary Bothaw* should contribute towards the Repair of the Parish Church of *St. Swithin*, it was adjudged, that they should; because where two Parishes are united by Act of Parliament, one of those two Parishes is extinct, and both Patrons present but as to one Church, though 'tis *alternis vicibus*.

King

Citation. Colour.

* King *versus* Rice. 1 Ld. Raym. 138. S. C.

* P. 90

IN London both the Churchwardens are chosen by the Parishioners; in other Places the *Parson* appoints one, and the Parish the other: *Per consuetudinem Angliæ*, they are sworn and admitted by the *Archdeacon*, and though they are unfit, he cannot refuse them. (14) 5 Mod. 325. Churchwardens, how chosen in London, or elsewhere.

Citation.

The Bishop of St. David's Case. Hill. 10 Will. 3. B. R. See 1
Burn Eccl. Law. Title Citation.

THE Bishop of St. David's was sued before the Archbishop of Canterbury for *Simony*, and was cited to answer at *Lambeth*, and not at the *Arches*, and it was to appear there before the Archbishop himself, and not before his Chancellor or Vicar-General, and for these Reasons he moved for a Prohibition; but the Court denied it, because the Archbishop hath a Provincial Power over all the Bishops of his Province. (1) 5 Mod. 433. Archbishop hath a Provincial Power over all the Bishops of his Province.

and may hold his Court where he will, either at the *Arches* or elsewhere; and he may likewise convene the Party before himself, and judge himself, and so may any other Bishop, for the Power of a Chancellor or Vicar-General, is only a delegated Power in Ease of the Bishop.

Machin *versus* Moulton. Hill. 11 Will. 3. B. R. 1 Ld. Raym.
452. S. C.

MOULTON was Parson of S. in the Diocese of York, within which Parish Machin had Lands, but lived in Lincoln in another Diocese, and now coming to York, Moulton sued him in the Spiritual Court there, for *Substraction of Tithes*; * and it was insisted against the Parson, that this was a *Citing him out of his Diocese*; at first the Court held, that the *Residency* of the Party draws the Cause to the Diocese where he lives, in transitory Matters, but not in local; as for Instance, an Executor must be sued for a Legacy where the Will was proved, and not where he lives: But afterwards this Case was ruled to stand upon a single Reason, for whatever the Law might be in other Instances, yet in the Case of *Tithes*, the Statute 32 H. 8. expressly enacts, that the Party *substracting* them shall appear before the Ordinary of the Diocese where they were substracted, and therefore a Consultation was granted in this Case. (2) 5 Mod. 450. For substracting Tithes, the Party shall be sued in the Diocese where substracted. * P. 91

† 2 Lev. 96.

Colour. See Pleas, 6.

Commitment.

Elderton's Case. Mich. 2 Annæ. 2 Ld. Raym. 978. S. C.

ELDERTON was committed by the Board of Green Cloth, for executing a *Fi. fa.* in *Whitehall*, and upon the Return of a *Habeas Corpus* it was argued to be lawful, and not at all prejudicial to the Privilege of the Palace, and that they had no Power to commit for Breach of the Peace, having a Power only over the Queen's Family, for the Government of the menial Servants, and that the Privilege of *Whitehall* was by the Statute † 28 H. 8. (1) Mod. Cases 73. The Queen's Palace hath no Privilege where she is totally absent. Postea Privilege 11. S. C. † 28 H. 8. cap. 12.

Commitment.

* P. 92

Northy Attorney-General on the other Side argued, that there is a standing Commission of the Peace for the *Verge and Palace*, * and that the Officers of the *Green Cloth* are always Commissioners; and that the Statute 28 H. 8. did not create the Privileges of a *Palace*, but only ascertained the Boundaries thereof, for the Queen may declare any House to be her *Palace* without the Parliament; and such Declaration being made under the Great Seal, it afterwards continues a *Palace*, though the Queen doth not reside there.

Powell Just. The Privilege of the *Palace* is by *Common Law*, and that in respect of the King's Presence: Breaking the *Exchequer* hath been held to be Burglary, though none of the King's Money was there; and one *Jones* had his Hand cut off for a Murder committed by him in the Tower, and was afterwards executed.

§ Mich. 15 & 16 Eliz.
Rot. 2. *Burdett v. Muskett*.

Holt Ch. Just. doubted the Case of Burglary in breaking the *Exchequer*, &c. and denied *Jones's* Case, because the same Fact cannot be a Misprision and a Murder, for the one will extinguish the other; he said, that it was true, his Hand was cut off, but it was without any Manner of Authority, for he had seen the § Roll, and there was no Judgment for it; he was of Opinion, that where the *Queen* was totally absent, and neither present by herself or by any of her Domesticks or Family, the Place hath no Privilege; but 'tis otherwise where it was only a personal Absence for a little Time: The *Queen* at this Time was at *Windsor*; now whilst she was there, suppose a Murder had been committed in *Whitehall*, shall the Fact be tried before the *Lord Steward*? and he held that it should not.

Clerke's Case.

(2)
5 Mod. 64, 156. Custom returned for the Mayor, &c. to commit to the Sheriff, and it did not appear that the Person to whom he was committed was Sheriff. * 1 Vent. 115.

* P. 93

THE Return of a *Habeas Corpus* was, that there was a Custom in *London*, that if a Man chosen of the Livery of any Company should refuse to take upon him the Office, that the Mayor and Aldermen might commit such Person * until he should declare, that he would take upon him the Office, and that *Clerke* was chosen a *Livery-man* of the Company of *Vintners*, and refused to hold the Office, and thereupon he was committed by a Warrant in Writing, &c. until he should declare, &c. it was objected, that this Return was ill, because it did not set forth to whom he should declare his Consent; besides, it was an insignificant Custom, to commit until he should declare, because after such Declaration he might still refuse to hold the Office; they might impose a Fine to be levied by Distress, but they cannot commit; 'tis true, a Custom to commit until he should take upon him the Office of an *Alderman*, is good, because 'tis an Office for Administration of Justice, but a *Livery-man* is not such an Office: Another Objection against the Return was, that * the Warrant of Commitment should have been returned in *hæc verba*: But *per Curiam*, this Commitment being by a *Court of Record*, the Warrant need not be returned in *hæc verba*, as it ought if it had been extrajudicial Commitment: But the chief Objection was, that here was a Custom returned for the Mayor and Aldermen to commit to the Sheriffs of *London*, &c. or any other Officer; and the Return was, that he was committed *Custodiæ meæ*, without saying, he was Sheriff of *London*, or any other Officer attending the Court; and for this Reason it was adjudged insufficient.

The King versus Wright.

(3)
1 Vent. 169. Indictment for suffering a Man committed for a forcible Entry to escape.

THE Justices of Peace committed T. S. for a forcible Entry, and G. H. was indicted for suffering him to escape; upon Not guilty pleaded, the Defendant was found guilty, and afterwards he brought a Writ of Error, for that it did not set forth how this Commitment was made, (*viz.*) whether upon View of the Force by the Justices, or upon an Indictment found; neither is it set forth, that *debito modo commissus fuit*: *Sed per Curiam*, 'tis only an Inducement to the Offence laid in the Indictment; besides, after a Verdict it shall be intended that the Commitment was legal.

The

Common.

HE who hath *Common appendant* or *appurtenant*, can keep but a Number of Cattle proportionable to his Land, for he can *Common* with no more than the Land to which his Common belongeth is able to maintain. (1)
Jones 282, 286.

One cannot prescribe to have sole *Common of Pasture*, excluding the Lord, but a Man may prescribe to have *solam pasturam omni Anno omni tempore Anni*, for this is not *Common* but *Pasture*, and the *Lord* is not excluded from the whole Profits, for he has the *Trees & Mines*. (2)
2 Lev. 2.

And such a *Prescription* is good, without alledging *Levancy and Couchancy*, but 'tis otherwise in Case of *Common*, for * that ought to be of such Cattle as are *Levant and Couchant* upon his Tenement, because the *Levancy, &c.* is the Measure of the Profit in the *Common*. (3)
* P. 94

One who hath *solam pasturam*, may licence another to put in his Cattle. (4)

And so may one who hath *Common* in gros for a certain Number, because such a *Common* is neither *appendant*, nor a *Common* in gros *sans nombre*. (5)

So where a Man hath *solam pasturam*, he may licence another *pro hac vice*, to depasture his Cattle, but not for any Time certain, for that would amount to a Lease of a Thing (which lies in grant) and without Deed. (6)

A *Common appurtenant* to a Messuage and Lands may be aliened, if 'tis for a certain Number of Beasts, otherwise where 'tis a *Common appurtenant* for all Beasts *levant and couchant* on the Land. (7)
2 Lev. 73.

One Commoner cannot distrain the Beasts of another Commoner depasturing in the *Common*, but he may the Beasts of a Stranger, because he had no Pre- tence of any Right. (8)
2 Lutw. 1240.

Woolston versus Slater

IN Replevin, the Defendant avowed for Damage-feasant on his *Common*; and upon a Demurrer to this Avowry it was adjudged not good, because he did not shew some particular Damage to himself, or that he could not have his *Common in tam Amplo modo quo debuit & consuevit*; for a Commoner cannot justify to distrain the Beast of a Stranger, without shewing how he is damnified in his *Common*. (9)
3 Lev. 104. Commoner cannot distrain the Beast of a Stranger, without shewing how he is damnified in his *Common*.

* Condition.

* P. 95

THE *Condition* of a Bond is always to be taken and construed in Favour of the Obligor, because 'tis the Words and Concession of the Obligee; and wherever any Sense can be collected out of the Words, it shall never be construed to be insensible, because 'tis to save a Forfeiture. (1)
Jones 182. Saund. 66.

Where a Man is bound in a Bond with a Condition, not to *Trade*, both Bond and Condition are void; but if he was bound not to *Trade in a particular Place*, 'tis good. (2)

These Diversities were taken by Holt, Ch. Just. ff. Where in *Executory Con- Condition precedent,* tracts the Agreement is, that one shall do such an Act, and for the doing thereof the (3)
Vol. III. 6 Z

Consideration.

1 Vent 177, 214.

the other shall pay so much Money, there the doing the Act is a *Condition precedent* to the Payment of the Money, and the Party shall not be compelled to pay till the Act is done.

(4)

1 Vent. 147. 1 Saund. 319.

Where a Day is appointed for the Payment of Money, which Day happens before the Thing contracted for can be performed, there an Action may be brought for the Money before the Thing is done, because here it appears, that the Party relied upon this Remedy, and never intended to make the Performance of the Thing a *Condition precedent*.

(5)

Dyer 76. contra.

Where a *certain Day of Payment* is appointed, which is to enure at a Time subsequent to the Performance of the Act, which by the Contract the Party had agreed to do, there *Performance must be averred*, and so is *Jones* 218. to be understood; and some other Books contrary to this are not Law, for every Man's Bargain ought to be performed as he intended it; and where a Man relies upon his Remedy, 'tis but just that he should stand to his Agreement, so, on the contrary, there is no Reason he should be compelled to trust when he did not intend it.

(6)

And therefore where two agree, that one shall have his Horse, and the other shall pay so much Money; no Action lies for the Money till the Horse is delivered.

* P. 96

* Page *versus* Heyward. Trin. 3 Annæ.

(7)
Where he who is to perform a Condition may be disabled, where not.

ADJUDGED, that where he who is to perform a Condition is only in Nature of a *Trustee* or Instrument, there a temporary Disability is absolute and for ever; but where the Performance is for his own Advantage, 'tis otherwise, for the Disability may be removed, and then he may perform the Condition.

Consideration.

(1)
Hutt. 77.

TH E Defendant promised, that in Consideration the Plaintiff would pay the Money due to him on Bond on such a Day, that he would deliver up the Bond; adjudged a good Consideration, because now he might have the Money without putting the Bond in Suit.

(2)
Sid. 89.

A Surety having paid the Debt of his Principal, who was dead, told his Executor, that he had paid the Money, who thereupon promised to repay him, if he would *forbear* till such a Day; adjudged a good Consideration, for the Executor was liable in Equity, though not at Law without a Promise.

(3)

A Promise upon a Consideration executed or past, unless 'tis grounded upon a precedent Request, is not good, but where it was made upon Request, the subsequent Promise relating to it shall prevail; as for Instance, if a Promise is made at the Time of the Request, for there the Consideration is meritorious: Thus a Promise to pay 10 *l.* for that *W. R.* was Bail for my Servant, is not good; but a Promise to pay 10 *l.* for that he was Bail at my Request for him, is good.

(4)

A Promise grounded on a *Consideration executory*, or which continues, is good, though the Consideration was without Request; as for Instance, for that you married my Daughter, I promise to give you 100 *l.* good, or for that I owe you 20 *l.* lent to me, I promise to pay you on such a Day, this is good, for the Debt continuing, the Consideration must continue.

Conspiracy.

* But where the Plaintiff declared, that in Consideration he would discharge the Defendant from 22 *l.* due from him to *W. R.* his Master, he (the Defendant) promised to lay out 40 *l.* in repairing the Plaintiff's Barge; this was held void, and the Consideration illegal, for the Plaintiff cannot discharge a Debt due to his Master.

(5)
* P. 97

Thornburgh *versus* Whitacre.

ASSUMPSIT in Consideration of half a Crown by him given to the Defendant, he promised to give him (the Plaintiff) *two Grains of Rye* on Monday following, and so on every Monday double, by Progression, for one Year: The Defendant pleaded *Non Assumpsit*, and upon a Motion to stay the Trial, it was denied; for *per Curiam*, though it amounts to a great Quantity, yet the Jury will consider the Folly of the Defendant, and give reasonable Damages.

(6)
Mod. Cases, 305. 1
Lev. 111. S. P. Consideration, though not good, yet the Jury may give reasonable Damages.

Conspiracy.

W H E N Conspiracy is the Gift of the Action, if one be acquitted, the other cannot be found guilty, but where the Gift of the Action is upon another Matter, and the Conspiracy is only laid by Way of Aggravation, if one be acquitted, the other may be found guilty; but in both Cases, if one be found guilty, and the other dies or doth not come in, Judgment may be given against him who was found guilty.

(1)
1 Vent. Thodie's Case.
1 Wilton 210.

Where a Man is *falsely and maliciously* indicted of any Crime, which may prejudice his Fame or Reputation, he may have an Action for the Conspiracy.

(2)

And so he may, though the Offence for which he was indicted doth not import Slander, but endanger his Liberty (*i. e.*) where 'tis such for which he may be imprisoned.

(3)

And so he may, if the Indictment is only injurious to his Property, in putting him to a needless Expence in defending himself.

(4)

* And in these Actions 'tis not the Conspiracy but the Damages, which are the Ground of them; and therefore *per Holt Ch. Just.* one may be acquitted and the other found guilty, which cannot be in a Writ of Conspiracy.

(5)
F. N. B. 116. 1 Wilton
210.
* P. 98

Where there is a malicious Indictment in Prejudice of the Fame and Reputation of another, though the Indictment is erroneous, or an *Ignoramus* is found yet an Action will lie, for the Mischief arises by the Slander; but 'tis otherwise where the Indictment is for a Trespass, or for a Riot, because in such Cases the Defendant is indicted in respect of an Injury to his Purse, which cannot be where 'tis erroneous, or an *Ignoramus* found.

(6)

Action on the Case for causing and maliciously procuring him to be indicted for a Riot, by Reason whereof he was put to great Charge in defending it, good, for he was damnified in his Property, and that out of Malice; but in such Case the Plaintiff must prove *express Malice* in the Defendant, and not only that he (the Plaintiff) was innocent.

(7)

Nota, Most of these Points were adjudged in the Case of *Savill and Roberts*.
Quod Vid.

Con-

Constable. See 1 Burn's Just. Title Constable.

Charley Parish's Case. 9 Will. 3. B. R.

(1)
Where a Constable may
execute a Warrant out of
his Parish, where Parish.

* P. 99

TH E Village of *Charley* having no *Constable*, the Justices by Order of Sessions appointed one: but *per Holt Ch. Just.* where there is no *Leet* the Constable ought to be chosen in the *Town* out of which the *Leet* was derived; 'tis true, the Justices have exercised this Power, and rather than to deprive them of it, this Court will *intend*, they have sufficient Authority by some Act of Parliament, and therefore if a *Town* be erected they may nominate and appoint a Constable; but *Charley* having no Constable, 'tis no *Vill* but a *Hamlet*, for a *Vill* and a *Constable* * are reciprocal: And as to the Authority of a *Constable* out of his Parish, he held, that if a Warrant is directed to a Constable by Name, he may execute it at any Place in the County, though he is not compellable to do it out of his Parish: But if 'tis directed to all Constables generally, in such Case 'tis to be taken respectively, and no Constable can execute it out of his Parish.

(2)

When the *County* was first divided into *Hundreds*, a *Constable*, or *Conservator Pacis*, was appointed in every *Hundred*, and this was in Aid of the Sheriff, who was the general *Conservator Pacis* through the whole County; and so also in Assistance of the Constables who had the whole *Hundred*, *Petty Constables* came at last to be appointed in every *Town*.

(3)

At first both the *Constable* and *Petty Constable* were appointed by the Sheriff in his *Tourn*, and there they were sworn, but now they are commonly appointed at the *Court Leet*, and, in Default thereof by the *Sessions*.

(4)

And as to his Authority out of his Parish: *Per Holt Ch. Just.* If a Warrant is directed to such a Constable by his Name, he may execute it in any Place in the County, though he is not compellable so to do, or to do it out of his Parish; but if the Warrant is directed to all Constables in general, then 'tis to be taken respectively, and in such Case a Constable cannot execute it out of his Parish.

Copyhold.

Fisher versus Nicholls. Hill. 12 Will. 3. B. R.

(1)
Postea Devise 10. Copy-
hold Estates are subject to
the Rules of Law.

* P. 100

IN this Case *Holt Ch. Just.* held, that Copyhold Estates are subject to the Rules of Law, and will not pass by such Words in a Conveyance as are improper to pass other Estates, unless there is a Custom for that Purpose, for that may and often doth distinguish them; thus by Custom in some Manors * a Grant to *A. B. and C.* shall be construed as a Gift to *A.* for Life, Remainder to *B.* for Life, Remainder to *C.* for Life.

Page versus Smith. Mich. 8 Will. 3.

(2)
What is Copyhold, and
what not.

* 2 Lutw. 1171.

IN this Case. *per Holt Chief Justice*, whatever may pass by Deed without Surrender, though it may be necessary to inroll the Deed, is no Copyhold; likewise whatsoever may pass by Surrender * *secundum consuetudinem Manerii*, without saying, *ad voluntatem Domini*, is no Copyhold.

Adjudged,

Coroner.

Adjudged, that where a Copyhold is *forfeited*, the Lord may grant it without a Seifure, for the Forfeiture is a Determination of the Will of the Party, and the Lord is in as of his Reversion. ^(3) 1 Lev. 26.

A. Dominus pro tempore habens titulum; dispenses with the Forfeiture by admitting a Copyholder who hath forfeited, and that not only as to himself but also to him in Reversion, for his Grant and Admittance amounts to an Entry for the Forfeiture and new Grant. ^(4)

But an Admittance by a Lord who hath no Title, but is a Disseisor, cannot purge the Forfeiture. *Ibid.* ^(5)

A Covenant to surrender Copyhold Lands to *W. R.* the Covenantor surrendered to two Copyholders out of Court, to the Use of *W. R.* adjudged this is a good Performance of the Covenant, for this is a good Surrender. ^(6) Hard. 293.

Coroner.

HE is chosen by the County, and therefore his Office doth not determine by the *Demise of the King*. ^(1) 1 Lev. 120.

He cannot take an *Inquisition* but upon *View of the Body*, therefore where one drowns himself, and the Body cannot be found, the *Inquisition* must be taken by Commission or by Justices of Peace, or Justices of Assize may make *Inquisition* without * a Commission, and such *Inquisitions* are traversable, though an *Inquisition* taken before a Coroner is not as it hath been sometimes held; but anciently it was traversable in all Cases, but where it was *fugam fecit*, and so 'tis now. ^(2) Poph. 209. 2 Lev. 141. * P. 101

Therefore where a Coroner's Inquest found *W. R. felo de se*, his Executors were admitted to *traverse* it, but the Inquest was quashed for the Omission of the Word *Murdravit*. ^(3) 2 Lev. 152.

A Coroner's Inquest *super visum Corporis*, found that *W. R. felonice seipsum in Rivum misit & in Rivo predicto seipsum emergit, & sic seipsum murdravit*, this was quashed, for *emerge* is to rise out, and not to sink down in the Water, and the Going into the River is no Felony, nor felonious, but 'tis the Drowning that makes it Felony; therefore the Conclusion, *& sic seipsum murdravit* without the Premises, is naught; for 'tis not sufficient to find a Man murdered himself, without shewing how. ^(4)

A Coroner's Inquest may be set aside for a *Misbehaviour* of him in his Office, and a *Melius inquirendum* by *B. R.* as supreme Coroner, or *B. R.* may issue out a Commission, or Justices of Oyer and Terminer may inquire, but there cannot be a *Melius inquirendum* to the Coroner. ^(5) 1 Vent.

Upon an Indictment and Trial for a Murder, Depositions taken before the Coroner may be given in Evidence, if the Witnesses are dead. ^(6) 1 Lev. 180.

He must write down the Effect of the Evidence given, and certify it to the Justices of Gaol-Delivery, and bind over the Witnesses to appear. ^(7) 3 H. 7. cap. 1. 1 & 2 Ph. & M. cap. 13.

Anonymous.

(1)
What is a Corporation.

PER Holt Ch. Just. A Corporation is an *Ens civile*, a *Corpus politicum*, a *Persona politica*, a *Collegium*, an *Universitas*, a *jus habendi & agendi*; some are constituted for publick and others for private Charities; the former are not subject to any Founder, or particular Statutes, but to the general Laws and Statutes of the Realm, by which they are maintained and supported; but private Charities are subject to the Rules and Ordinances of the Founder, who by Law is *Visitor*, unless he appoint another.

Anonymous. Mich. 10 Will. 3. C. B.

(2)
Corporation by Prescription may have several Names, but if by Charter it can have but one Name. See Hardres 405.

A Corporation, *per Treby Ch. Just.* and *Powell Just.* if by *Prescription*, may have several Names; but if by Charter, 'tis otherwise, for in such Case it cannot have several Names at the same Time and to the same Purpose; for if a new Charter is granted, and by a new Name, the old one is gone; as in the Case of Baptism by one Name, and Confirmation by another, but such Corporation may have several Names to several Purposes; for it may be created *per nomen D.* to take and to grant, and *per nomen F.* to sue and be sued.

College of Physicians *versus* Salmon. Trin. 13 Will. 3. B. R.
1 *Ld. Raym.* 680. S. C.

(3)
5 *Mod.* 327. 2 *Salk.* 451. S. C. Corporation must have a Name, either express or implied, in the Patent.

*I*N this Case it was held by *Holt Ch. Just.* that where my Lord *Coke* says, a Corporation must have a Name, it must be understood, either as expressed in the Patent, or implied in the Nature of the Thing; as if the King should incorporate the Inhabitants of *Dale*, and give them Power to choose a *Mayor*; in this Case, though there is no Name of Incorporation in the Patent, yet it would be a good Incorporation, and the Name * would be *Mayor and Commonalty*; so the City of *Norwich* was incorporated by a Grant of *H. 4.* by the Name of *Mayor and Sheriffs*, and they are called, *Mayor, Sheriffs and Commonalty*.

* P. 103

The Mayor of Thetford's Case. Hill. 1 Annæ.

(4)
1 *Salk.* 192. Where a Corporation may do an Act on Record, without their Common Seal.

A *Mandamus* being returned without the *Common Seal*, and without the Hand of the *Mayor*; and it being moved, that though it was returned in the Name of the Corporation, yet it was no corporate Act to charge the Corporation, without their *Common Seal*, nor the *Mayor* without his Hand, and therefore one or both ought to be done; whereupon the Court ordered *Precedents* to be searched, and it appeared that there were many without the *Common Seal*, and without the *Mayor subscribing* his Name; and it was held by *Holt Ch. Just.* to whom the Court agreed, that a Corporation may do an Act on Record without their *Common Seal*; that this is the Case of the *City of London* every Year, who make an *Attorney* yearly in this Court by *Warrant of Attorney*, without *Sealing or Signing it*, and the Reason is, because they are estopped by the Record to say, that it is not their Act; and therefore, if an Action should be brought against the Corporation for a False Return, they are estopped to say, that 'tis not their Return, for 'tis *Responsio Majoris, &c.* upon Record; and as to the Hand of the *Mayor*, 'tis a sufficient Evidence to charge him, that the *Mandamus* was delivered to him, and that it hath his Return, and 'tis incumbent upon him to shew the contrary; for the *Mayor* or any other Magistrate of the Corporation, who caused or procured the Return, are chargeable in their Private Capacities, if 'tis false.

Costs.

Newton *versus* Travers. Mich. 8 Will. 3.

ADJUDGED, that a *Dean and Chapter*, or a *Warden and Fellows of a College*, may Grant or Lease by the Name of *Dean and Chapter, &c.* and may Lease 1 Leon. 307. without shewing their proper Names; and so they may plead or be impleaded, 1 Inst. 3. a. contra. because in their corporate Capacity they have no Name of Baptism, or any other Name than that by which they are incorporated; but 'tis otherwise in the Case of a Parson and Vicar, for they must Use their Name of Baptism. (5)

Anonymous. Pasch. 13 Will. 3.

AN Action was brought against the *East-India Company*, who are a Corporation, and the Action was for 5000 l. and several *Distringas*'s served, but they did not appear; whereupon the Court was moved, that they might have exemplary Issues returned, and a Rule was made that the Sheriff should return good Issues, otherwise to bring an Action against him for not doing it; but at last he was ordered to attend. * P. 104 (6) Corporation not appearing to an Action.

An Information was exhibited against the *Bailiffs and Burgeses of Yarmouth*, one of the Bailiffs (there being two) appointed an Attorney to appear, but the other would not consent, and the Court was moved, that their Liberties might be seised for Want of an Appearance: But the better Opinion was, that upon an Information in Nature of a *Quo Warranto*, which is *datum est Curie intelligi*, and which is in Nature of a personal Action, there cannot be a Seizure before a Summons (*i. e.*) the Liberties cannot be seised upon a *Venire facias*, but upon a *Distringas*; but 'tis otherwise in a *Quo Warranto*, for there 'tis *Summonitus fuit*; then it was made a Question, whether a Warrant of Attorney made by one of the Bailiffs was not sufficient, because the Corporation did not disavow it, but that was not determined. (7) Corporation not appearing, there cannot be a Seizure without a Summons.

Costs. See Mr. Serjeant Sayer's excellent *Treatise on Costs*.

The King *versus* Summers. Pasch. 1 Annæ.

THE Defendant was indicted for a *Trespass*, and also for a Riot; and upon Not guilty pleaded, it was removed into *B. R.* by *Certiorari*, and the Defendant went before the Master, who taxed Costs; and the Court was moved, that he might go before the Master again, that the Prosecutor might be considered in the Costs for his Charges below, the Master having only taxed Costs in Respect to the Charges since the *Certiorari*; and *per Curiam*, The Master ought not to consider the Charges below, but only upon the *Certiorari*; then it was moved to aggravate the Fine, but that was denied, since the Party had been before the Master, and if he insisted on it, the Court would set aside the Costs already taxed. (1) Costs taxed after the *Certiorari*, without considering the Costs below. * P. 105

Bigland *versus* Robinson. Hill. 8 Will. 3. B. R.

ADJUDGED, that where *Executors* sue upon any *Contract of their Testator*, or for any Wrong done to him, they shall pay no Costs either upon a Nonsuit or Verdict against them; so wherever he must sue as Executor, as for Instance, he brought an Action of Debt upon a Bond due to his Testator, the Defendant pleaded Payment of the Money to himself (*viz.*) to the Executor, upon which they were at Issue, and a Verdict against the Plaintiff, yet he paid no Costs; but if he had brought the Money into Court, then the Plaintiff must proceed at his Peril. (2) Executors pay no Costs.

Costs.

Jenkins & Ux' versus Plombe. Hill. 2 Annæ B. R.

(3)
Mod. Cases 91, 181.
1 Salk. 266. When Husband and Wife must join in the Action.

DEBT by Husband and Wife as Executors of W. R. in which they declared, that the Defendant was indebted to them as Executors for so much Money received by the Defendant for them as Executors; upon *Non Assumpsit* pleaded, the Cause came to be tried, and the Plaintiffs were Nonsuited; and in this Case several Points were resolved by Holt Ch. Just. to which the Court agreed.

1. Where a Man marries a Woman, who is an *Executrix*, and if before the Marriage a Stranger receives Money due to the Testator, and he is sued for it, the Husband and Wife must join in the Action; but where the Money is received after the Marriage, the Husband may sue alone.

2. If the Money was received after the Marriage, and by Order or Consent of the Husband, 'tis the same Thing as if the Husband had received it himself, it became *Assets* in his Hands, and the original Debtor of the Testator is discharged; and if 'tis paid by his Order or Appointment to a third Person, 'tis a *Devolavit* in the Executors, because the original Debt to the Testator is paid off, and here is a new Debtor to the Executor, who owed nothing to the Testator.

* P. 106

* 3. In the principal Case, if the Defendant had received this Money, without the Order or Consent of the Husband, in such Case he, by bringing this Action, had affirmed the Receipt, and that it was his Election, and that he consented to make the Defendant his Debtor, so that the original Debtor to the Testator was thereby discharged.

4. That though the very Bringing an Action against the Defendant shews, that the Plaintiffs consented to make him their Debtor, & *omnis ratihabitio retrotrahitur*, &c. so as the Plaintiffs might bring this Action in their own Name, yet the bare bringing the Action did not make it *Assets* in their Hands till Judgment was obtained; and therefore if the Plaintiffs fail in their Action (as they did in this Case, being Nonsuit) the Matter is set at large again, and the Plaintiff may sue the original Debtor of the Testator, if he will.

Where an Executor shall pay Costs, where not.

5. That Executors are not excused from paying Costs by the Letter of the Statute, but by a very favourable Construction thereof; as being presumed to have no Knowledge of the Affairs of their Testator, and therefore an Executor shall pay Costs, for not going on to Trial; and where a Cause of Action arises to the Executor himself, for the which he may sue without naming himself Executor, he shall pay Costs; and though he names himself Executor, and sues as such, yet if the Case was so, that he might have sued without naming himself Executor, he shall pay Costs; and that in the principal Case, he might have sued without naming himself Executor, because the Action was brought for so much Money received by the Defendant to his (the Plaintiff's) Use, and by his Order, and therefore shall pay Costs. And *per Curiam*, An Executor may bring Trover, as Executor, for a Conversion in the Time of his Testator, and shall not pay Costs, but 'tis otherwise, if the Conversion was in his own Time; so where a Judgment is obtained by the Testator, and the Defendant escapes in the Time of the Executor, for which he brings an Action and is Nonsuit, he shall not pay Costs, but 'tis otherwise, if the Judgment and Escape were both in his own Time.

If W. R. is indebted to the Testator, and the Executor Accompts with him, he (the Executor) may bring an *Insimul computasset*; and this is a new Action, which the Testator himself could not have brought, yet the Plaintiff shall not pay Costs, because the old Debt remains, for 'tis not extinguished by the Account, but made certain, so that 'tis not a New Cause of Action; but where an Executor brought Trover and Conversion, and the Defendant came to an Agreement with him, to pay so much for the Conversion, in such Case the Plaintiff shall

* P. 107

Covenant.

shall pay Costs, because by this new Agreement the original Cause of Action is extinguished.

The Ch. Just. held, that where a Plaintiff sues as Executor, and could not sue but as such, the Thing for which the Suit is brought is not *Assets* till Execution sued forth; but where he needs not sue as Executor, 'tis not *Assets* till Judgment, and then it is, for the original Debtor is then discharged, so that 'tis a *Devastavit*: This Case is reported in 1 *Salk.* 207. but not so full and so clear as here, and in the Argument these Cases were cited, *Latch.* 220. *Hutt.* 78, 79, 214, 220. 3 *Lev.* 60, 375. 2 *Lev.* 185. 1 *Vent.* 109, 119. *Jones* 170. *Hob.* 219, 233, 284. 1 *Cro.* 29, 36, 175, 229.

(6)

Anonymous. Hill. 9 Will. 3.

A Motion was made, that a *Pauper* might pay Costs for not going on to a Trial: *Sed per Curiam*, he pays no Costs unless upon a *Nonsuit*, or where the Verdict is found against him, and then he shall pay Costs, or be whipped. See Stat. 23 H. 8. cap. 15.

Covenant.

IN Covenant, the Plaintiff assigned several Breaches in *not repairing*, the Defendant pleaded *non infregit conventiones*, and upon Demurrer to this Plea it was adjudged ill, because *not repairing*, and *non infregit conventiones* are two Negatives, upon which Issue cannot be joined, but 'tis good after a Verdict, for the Issue is not immaterial but informal only.

(1)

1 *Lev.* 114, 183. *Pitt v. Ruffel.*

Covenant and declares, that W. R. and his Wife levied a Fine of Lands *sur concessit*, to the Plaintiff with Warranty: *Per Curiam*, an Action of Covenant will lie upon this Warranty as well as Voucher or *Warrantia Chartæ*.

(2)

1 *Lev.* 301.

Covenant for Non-payment of Rent, and assigned the Breach, that the Lessee did not pay the Rent at any of the Feast * Days on which it ought to be paid during the Term; this Declaration was held good, though general, for it may be true, that no Rent was paid on any of the said Days.

(3)

1 *Lev.* 78. * P. 108

The Plaintiff conveyed an Office to the Defendant, *provided*, that out of the first Profits he pay the Plaintiff 500 l. adjudged, that an Action of Covenant lies on this *Proviso*, for 'tis not by Way of Condition or Defeasance, but in Nature of a Covenant to pay the Money.

(4)

1 *Lev.* 155.

Covenant to pay W. R. 100 l. he making him an Estate in D. adjudged, that if he tender him a Feoffment, and offer to make *Livery and Seisin*, &c. he may bring an Action for the Money as if he had actually made a Title.

(5)

1 *Vent.* 148.

Lessee for forty Years made an Under-lease to W. R. for five Years, and afterwards made a Lease to L. L. for forty Years, who covenants to repair *durante termino præd.* 40 *Annorum*, the Under-Lessee refused to *attorn*, yet L. L. the Lessee for forty Years must repair, because his Lease is commenced in Point of Computation.

(6)

1 *Vent.* 185.

Debt upon a Bond of Covenants, and for Breach, assigned, that the Defendant had broke the Covenants; upon a Demurrer to this Declaration it was held to be ill, because 'tis double, for he ought to have insisted upon one Breach certain.

(7)

1 *Vent.* 126.

County Palatine.

Copley *versus* Hepworth. Trin. 3 Jac. Rot. 261. B. R.

(8)
What are mutual Covenants.

* Roll. Abr. 848. 2 Cro. 172.

IN an Action of *Covenant* upon *Articles of Agreement, &c.* wherein the Plaintiff covenanted with the Defendant *facere dimissionem*, to him of a *Mill*, paying 20 *l.* Rent *per Annum* for so many Years, and the Defendant covenanted to pay the Rent during the Term; the Plaintiff brought this Action for *Non-payment of Rent*; in which he set forth, that the Defendant *entered and enjoyed* the Mill, &c. The Defendant pleaded, that the Plaintiff did not make *any Lease* to him; and upon Demurrer to this Plea it was adjudged, that these Articles did not amount to a * Lease, being only a *Covenant facere dimissionem*; and Holt Ch. Just. held, that the Making the Lease was a *Matter precedent*, and that the Plaintiff could not be intitled to the Rent till a Lease was made, but *Eyres, Dolben, and Gregory*, Justices, *contra*, because these are *mutual Covenants*, and equal Remedies are on both Sides; and 'tis alledged that the Defendant entered, but upon the other Point the Defendant had Judgment upon arguing the Demurrer *Micb. 2 Will. 3.*

* P. 108

Hannam *versus* Redman. Mich. 9 Will. 3. B. R.

(9)
Covenant to save the Lessee harmless from a Rent-charge, if he pay it without Compulsion, he pays it in his own Wrong.

PER Holt Ch. Just. Where several Lands are charged with a Rent-charge, and the Owner of these Lands makes a Lease thereof, and covenants with the Lessee to *save him harmless, &c.* and afterwards the Lessee pays the Rent to the Grantee of the Rent-charge, *voluntarily and without Compulsion*, in such Case he pays it in his own Wrong, and must pay it again to the Lessor; but if he is distrained for the Rent-charge and his Goods taken, this is a Breach of the Covenant, and not before; and the Lessee must not alledge generally, that he was compelled to pay the Rent, but must shew how.

(10)
1 Vent. 56.

A Bishop made a Lease, in which the Lessee covenanted to *repair*, the Bishop died, and his Executors brought an Action for not repairing in the Time of the Bishop, and adjudged well.

Covenant to stand seized. See Uses:

* P. 110

* County Palatine.

Cotton *versus* Johnson. Hill. 2 Will. 3. B. R.

(11)
1 Salk. 183. S. C.
In Ejectment for Lands in Ely, a Venire facias was prayed to the next Vill.

IN Ejectment for Lands in the Isle of Ely, after Not guilty pleaded, it was suggested on the Roll, the Privilege of the County Palatine, that no Jury should be returned out of the Isle, and so a *Venire facias* was prayed to R. the next Vill in the County of Cambridge, *Et quia videtur Justiciariis hic rationi consonans ei conceditur*; it was objected, that the Defendant's Confession should have been entered likewise on the Roll, (*viz.*) *Et quia Defendens hoc non dedit Ideo ei conceditur*, but adjudged, though some Precedents are so, yet either Way is well enough; for if the Fact is otherwise, he may bring a Writ of Error, and assign it for Error; then it was objected, that the Entry ought to have been, *quod liberi tenentes nec residentes in eadem insula non aggredi debent ad aliquam juratam extra libertatem illam faciend'*; for otherwise it doth not appear to be a Privilege annexed to the Inhabitants, but a mere Cognisance in the Bishop; however, the Trial being in the County of Cambridge, of which this is Parcel, the Court held it to be aided by the Statute 16 & 17 Car. 2. cap. 8.

Though

Custom.

Though 'tis commonly said, that *Lancaster* is a County Palatine by Act of Parliament, and *Chester* and *Durham* by Prescription; yet this must not be intended of a mere Prescription, because a Franchise, *quæ se exaltat in Prærogativum Regis*, can never be gained by mere Prescription, but must depend on ancient Grants of Kings, and Allowances in *Eyre* as well as by Prescription. (2)

'Tis true, *Lancaster* was erected into a County Palatine, in pleno Parlamento, Anno 50 Ed. 3. and it was granted by the King to his Son *John* for Life, that it should have *jura Regalia*, and a King-like Power to pardon Treasons, Outlawries, to make Justices of Peace and Justices of Assize, and all Processes and Indictments were in his Name; but these Royalties are abridged by the Statute 27 H. 8. cap. 24. (3)

* But because *Lancaster* was erected by Act of Parliament into a County Palatine, therefore Outlawry in *Lancaster* is pleadable in the Courts of *Westminster*, but Outlawry in *Chester* is not. (4)

By the Charter of H. 4. confirmed by Parliament, the Possessions of the Dutchy of *Lancaster* are kept separate from the Crown; and are to be in the King as they were before he was King, so as to pass by Livery or Grant. (5)

There is a Seal for the County Palatine, and another for the Dutchy, (i. e.) such Lands as lie out of the County Palatine, and yet are Part of the Dutchy; for such there are, and the Dukes of *Lancaster* held them, but not as Counts Palatine, for they had not *jura Regalia* over them. (6)

'Tis for this Reason, that the King may make a Corporation by the Seal of the County Palatine, within the County Palatine, for so might the Count Palatine himself, as having *jura Regalia*. (7)

But the King cannot grant or make a Corporation by the Dutchy Seal within the Dutchy Lands, because 'tis *jus Regale* to grant a Corporation, and the Duke of *Lancaster* *qua talis* could not do it. (8)

Any thing natural, and which arises from the Land, and which might be granted, the King may grant under the Dutchy Seal, for those Things might be granted by the Duke of *Lancaster* as he was a Subject; of this Nature are *Advowsons*, *Rents*, *Ways*, *Offices*, &c. for these favour of the Land, and might have been granted by the Duke before the Possessions came to the Crown; but 'tis not so of a *Fair* or *Market*, for those are *jura Regalia*. (9)

Prohibition was prayed to the Dutchy Court at *Westminster*, for holding Plea of Lands within the County Palatine, when there is a Court in the Dutchy for that Purpose, and the Dutchy at *Westminster* is only for Lands out of the County Palatine. *Et per Curiam*, It doth not appear, that they have any legal Authority to act as a Court of Equity, for the Statute of Ed. 4. doth not give them a Court of Equity, but a Court of Revenue; however it was allowed, because of long Continuance and Practice. (10)

* Custom.

* P. 112

See that most excellent Report of the Case of *Tanistry*, in Sir John Davy's Reports, wherein this Subject is treated with great Learning and Perspicuity. Fol. 28. b.

AS no Law can oblige a People without their Consent, so wherever they consent and use a certain Rule or Method as a Law, such Rule, &c. gives it the Power of a Law. (1)

Now

Custom.

(2) Now this *Consent* is either *verbis* or *factis* (*i. e.*) 'tis expressed by *Writing* or implied by Deeds and Actions; and where a Law is founded on an implied Assent, *rebus & factis*, 'tis either Common Law or Custom.

(3) If 'tis *Universa*, then 'tis *Common Law*, if *Particular* to this or that Place, then 'tis *Custom*, and had its Rise in this Manner;

(4) ¶. When the People found any Act or Rule to be fit and agreeable in its first Instance, it was natural for them to repeat and practise that Rule; and if this continued from Age to Age, and was so practised, then it grew into a Law either local or national, according to the Extent of it.

(5) And such Custom ought to have four Properties, (1.) It ought to have a reasonable Commencement, for no Usage can make that good, which was not so *ab initio*.

(6) But a Custom shall not be taken to be unreasonable because 'tis contrary to the *Common Law*; for the Customs of *Gavelkind* and *Borough English* are contrary to the Common Law, and yet they are allowed to be good.

(7) Neither is a Custom unreasonable for being injurious to private Persons or Interests, so as it tends to the publick and general Advantage of the People; therefore a Custom to undermine Houses *in publico incendio*, a Custom to turn his Plough on the Headland of another, are good; the one to prevent the Spreading of the Fire, and the other in Favour of Husbandry.

(8) But where a Custom is injurious to the Publick, or to a great Number of People, and only for the Benefit of some Individual, in such Cases 'tis unreasonable; as for Instance, a Custom, that the Commoners of such a Manor shall not put in * their Cattle, till the Lord first put in his Beasts, or that the Lord shall distrain and keep the Distress taken till a Fine or Ransom is paid at his Pleasure; for the Original of such Customs was by Tort or Usurpation.

* P. 113

(2.) A Custom ought to be certain.

(3.) The Continuance to be without Interruption; for Discontinuance destroys a Custom by the same Reason that Continuance made it.

(4.) A Custom must not be against the Prerogative of the King.

(9) Now as to *Local Customs* it hath been held, that a Custom of a Manor cannot extend beyond that Manor; therefore in *Trespas* for breaking his Close in *D.* the Defendant pleaded a Custom within that Manor for every Tenant to have a Way in the Place where, &c. and it did not appear, that the *locus in quo*, &c. was within the Manor, this was held naught upon a Demurrer.

Sid. 237.

(10) *Trespas* for Breaking his Close; the Defendant pleaded, that the Close lay in the Hundred of *W.* in the said County, called the *Kingsfield*, and that in the said Place, called the *Kingsfield*, there is, &c. *Et talis consuetudo usitat' in eodem quod bene alicui* (omitting the Word *licuit*) *volenti fodere pro plumbo. Et per Curiam*, Want of the Word *licuit* makes all imperfect; but if it had been in, yet this Plea is naught, because he ought to have laid a *Positive Usage in Fact*, and not *Quod, bene licuit alicui*, &c. besides the Custom is not laid in any Manor, Vill or Parish, and there cannot be a Custom in a particular Parcel of Ground called the *Kingsfield*.

Moor 123. 3 Cro. 110,
392. 1 Lev. 262.

(11) To plead *Pro eo quod secundum consuetudinem*, a Thing is so and so, is naught; for it ought to be positively alledged (*viz.*) *quod infra* such a Place, *talit' habetur consuetudo*.

2 Lutw. 1188.

Custom,

Damages.

Custom, that the Parson, in Consideration of the greater Increase of Tithes, shall keep a *Bull and a Boar*; this is good, because founded on a Consideration of some Benefit. Moor 35. (12) Cro. Eliz. 203.

But a *Custom in London*, that if a Stranger die in one Parish and is buried in another, that he shall pay the same Fees in the Parish where he died, that he doth to the Parish where he is buried, is naught, because he was not bound to come to Church, and to receive the Sacrament in that Parish where *buried*. Roll. Abr. 559. (13)

* Damages. See Judgments 13.

* P. 114

See Mr. Serjeant Sayer's Treatise on Damages.

WHERE a Judgment is given for the Plaintiff, and the Defendant brings a Writ of Error, and the first Judgment is affirmed, the Defendant in Error shall have Damages and Costs for the Delay of Execution, and the Trouble he is put to, and this by the Statute 3 H. 7. cap. 10. but 'tis otherwise, if the first Judgment was given for the Defendant, and the Plaintiff brings a Writ of Error, for there is no Delay in the Execution; but this is now altered by the Statute 8 & 9 Will. 3. cap. 11. by which it is enacted, that it shall extend only to Judgments upon *Verdicts*.

(1)

In all Actions where the Plaintiff hath Damages by Common Law. he hath Costs likewise by the Common Law; and so 'tis in all Actions wherein the Plaintiff hath Damages by Virtue of the Statute of Ed. 6. or any precedent Statute, for in all such Actions the Statute gives him Costs as well as Damages. 1 Cro. 560. 1 Vent. 133. 3 Lev. 374. (2)

And in any of these Cases, if a subsequent Statute *doubles or trebles the Damages*, the Costs are so too; as for Instance, in Trespass for a Forcible Entry upon the Statute 8 H. 6. or in an Action of the Case upon the Stat. 2 H. 4. for suing in the Admiralty for a Matter arising on the Land, or in an Action of Waste, upon the Statute of Gloucester, against Tenant in Dower, or Tenant by Curtesy, for these are Acts of Additions (*i. e.*) there were Damages at Common Law in these Cases, which these Statutes increase.

But in an Action of Waste against Tenant for Life, or in a *Quare Impedit*, the Plaintiff shall have Damages, but no Costs, because there were no Damages at Common Law, but are given after the Statute 1 Ed. 6. by subsequent Statutes. (4)

Now in these Statutes of Creation (*i. e.*) such Statutes which give Damages, where there were none before at Common Law, or before the first of Ed. 6. there is a Diversity, where a Statute gives certain Damages, and where uncertain; for if a Statute of Creation gives *uncertain Damages*, no Costs can be recovered, but if the Damages are certain, Costs shall be * recovered as well as Damages; but this is only to be intended of Private Actions to the Party grieved, and not of Popular Actions, as in *Qui quam, Informations, &c.* * P. 115 (5)

Cook *versus* Beale. 1 Ld. Raym. 176. S. C.

ADJUDGED between these Parties in an Action of Assault, &c. that where the Plaintiff declares of a Wounding by the Word *Maibemavit*, 'tis clear the Damages may be increased, though Damages are given by the Jury. (6) Where the Damages may be increased; where not.

So 'tis where the Plaintiff sets forth a Wound so particular in his Declaration, that by the Description it appears to be a *Maibem*; and so 'tis where the Wound Vol. III. 7 C is (7)

Death of either Party.

is visible and apparent; and this may be done, whether Damages are given by the Jury upon an Issue joined, or upon a Writ of Inquiry.

(8)
Dyer 105, 228.

But this *Increase of Damages* must be given by the Courts at *Westminster* upon the *View of the Wounding*, or upon *Affidavits* made thereof; and it cannot be done by the Justices of *Nisi prius*, who, if the Wound is very great, must indorse the Evidence on the *Postea*, and upon such Evidence the Damages will be increased, though the Wound was not set forth in the Word *Maibemavit* in the Declaration: and so 'tis without such *Indorsement* where the Cause was tried before a Judge of that Court where the Motion is made for Increase of Damages.

(9)
2 Lev. 124.

Trespass in the *Palace Court*, the Cause was removed into *B. R.* by the Defendant, and the Jury having given 15 s. Damages, the Question was upon the Statute 22 & 23 Car. 2. cap. 9. whether the Plaintiff should have no more Costs than Damages: *Et per Curiam*, the Cause being removed by the Defendant, the Plaintiff shall have more Costs, but not if it had been removed by the Plaintiff, for so he might be more vexatious.

* P. 116

* **Death of either Party.** See *Scire facias* 2.

2 Ld. Raym. 766.

(1)
1 Salk. 87. S. C.
Where a Judgment was
entered after the Party
died.

Oades versus Woodward. Hill. 1 Annæ, B. R.

THE Case was, one *Woodward* gave a Warrant of Attorney to confess a Judgment, and died in *Hilary Vacation*, the Attorney entered the Judgment as of *Hilary Term*, but did not bring in the Roll till after the *Essoin-Day of Easter Term*, so that now it was a *post Terminum Roll*; and the Question was, whether it should be received, if it was received, then the Judgment would be of *Hilary Term*, which was whilst the Party was alive, and consequently it would be good: But *per Holt Ch. Just.* this Roll was not admitted to be filed; by the Course of the Court, all the Rolls of *Hilary Term* ought to be brought in before the *Essoin-Day of Easter Term*, and a *post Terminum Roll* cannot be received without Leave of the Court, upon Motion made for that Purpose; and such Leave is never granted, but where it appears to the Court that no Body can be prejudiced by it, for 'tis dangerous; and though it hath been done, he would never consent that it should be done again, because by this Means the *Statute of Frauds*, and the *Statute for docquetting Judgments* would be frustrated, for if the Court should allow the Filing this Roll in *Easter Term* as a Judgment in *Hilary Term*, when it was not amongst the Rolls of that Term, or the Vacation following, how could Purchasers avoid it, when it was neither docquetted, or to be searched after in that Term, upon either of those Statutes; so the Court would not allow the Filing it.

* P. 117

(2)
Action against some Defendants, one died before the Trial, the Judgment against the rest was reversed.

* **Woolridge versus Clobberie.** Mich. 4 Jac. Rot. 15. B. R.

* Cro. Eliz. 145. Cro. Car. 426, 509, 514. Jones 356, 367, 400.

AN Action on the Case was brought against four Defendants, and the Plaintiff had a Verdict and Judgment, (it was for stopping his Watercourse) one of the four Defendants died before the Trial; and afterwards, upon a Writ of Error brought, the Judgment was held to be erroneous as to him who was dead, and therefore it must be reversed against all the Survivors, for it cannot be reversed in Parcels: The Difference was taken between Actions founded on *Torts* and on *Contracts*, in the first Case, if there are several Defendants, and one die before the Verdict, yet the Action shall stand; so if he die after Verdict, the Plaintiff may suggest the Death of him *puis darrein Continuance*, and take Judgment against the Survivors, but there needs no Surmise to alter the *Distringas* or the *Venire*, for by the Death of one Defendant the Action doth not

Debt.

not absolutely abate: 'Tis otherwise in Actions founded upon *Contracts*, which in their Nature are entire; and therefore in such Cases, if 'tis suggested that one is dead, no * Judgment shall be entered against the Survivors: There is also a * Com. 186. Sid. 259. Difference between Verdicts at *Nisi prius* and at *Bar*; for if after a Verdict at the *Nisi prius*, one of the Defendants die before Judgment, there, if 'tis entered against all, 'tis erroneous, but 'tis otherwise if entered after a Trial at $\frac{1}{2}$ Bar, for $\frac{1}{2}$ Poph. 132. Roll. 768. there the Judgment relates to the Verdict.

Ellwaies *versus* Lucy.

THE Plaintiff brought Trespass against four Defendants, they all appeared, and after some Continuances, three of them pleaded, that the other died after the last Continuance, *Et petunt iudicium de Breui Et quod Breve predictum Cassetur*; and upon Demurrer to this Plea it was adjudged ill, because they should have concluded, *Et petunt iudicium si Curia ulterius procedere vult*, for the Writ actually abated by the Death of the other Defendant. (3) 3 Lev. 120. Trespass against four Defendants, 3 pleaded, and the other died, the Action is abated.

* Debt.

* P. 118

Ward *versus* Evans. Mich. 2 Annæ. 2 Ld. Raym. 928. S. C. Comyns 198. S.C.

THE Case. *Jf.* There was a Debt of 50 l. due to the Master, who sent his Servant with the Debtor to receive the Money; they went to a Goldsmith, upon whom the Debtor had a Bill of 100 l. and the Goldsmith indorses 50 l. on that Bill, and gave the Servant a Bill upon another Goldsmith for 50 l. and the next Day that Goldsmith broke, and thereupon the Master resorted to the first Goldsmith, who refusing to pay the Money, an Action was brought against him by the Master, and whether it would lie, or not, was the Question: *Et per Holt Ch. Just.* the Taking a Note in Writing for Goods sold may amount to a Payment of the Money, because 'tis Part of the original Contract; but Paper is no Payment where there was an original and precedent Debt as in this Case there was, for 'tis intended to be taken upon this Condition, (*viz.*) That the Money be paid in a convenient Time. (1) Mod. Cases 36. 2 Salk. 442. Taking Paper is no Payment where there was a Day precedent.

Marle *versus* Flake. Trin. 12 Will. 3. B. R.

PER Holt Ch. Just. Payment of a Bond with a Condition indorsed is a good Plea before but not after, no more than to an Action of Debt upon a single Bill, for when the Breach is made, the Benefit of the Condition, which is always in Behalf of the Obligor, is gone. (2) Payment of Money on a Bond is a good Plea before the Condition broken.

But now see the Stat. 4 & 5 Anne for Amendment of the Law.

Adjudged, that where the Lessor assigned his Rent without the Reversion, that the Assignee (if the Tenant agrees) may maintain an Action of Debt for the Rent, because the Privity of Contract is transferred. (3) 1 Lev. 22.

The Lessor made a Lease, reserving 20 l. per Annum to be paid quarterly, Debt may be brought for the last Quarter's Rent, without shewing the other three Quarters were satisfied, for every Quarter's Rent is a distinct Debt, and distinct Actions lie for each Quarter. (4) 2 Vent. 129.

Deeds.

(1)
Spelm. Rel. 8.

THE Elder Saxons made Conveyances of their Lands here, without Deed or Writing (*viz.*) either by the Delivery of a *Turfe*, of a new Staff, &c. The first Deed concerning Lands was made by *Withredus King of Kent*, Anno 694. and that, and other subsequent Writings made for such Purposes, were called *Chirographs*, but in the Time of the *Normans*, they were called *Charters*, and afterward *Deeds*.

Anonymous. Pasch. 9 Will. 3.

(2)
By a *Profert hic in Curia*,
the Deed is in Court.

P E R Holt, Chief Justice, when a Deed is pleaded with a *Profert hic in Curia* the very Deed itself is by Intendment of Law immediately in the Possession of the Court, and therefore when *Oyer* is craved, 'tis of the Court, and not of the Party.

(3)

After *Oyer* is craved, the Deed is become Parcel of the Record, and the Court must judge upon the whole.

(4)

The Demand of *Oyer* is a Kind of Plea, and may be counterpleaded.

(5)
Sid. 308.

When a Deed is not in Court no *Oyer* can be granted ; therefore when *Oyer* is prayed, 'tis always intended, that the Deed is in Court, and the Words *ei legitur in hac verba*, &c. are the Act of the Court.

(6)
1 Saund. 8, 9.

In Debt against an Administrator upon a Bond of his Intestate, the Defendant demanded *Oyer* of the Bond and Condition & *ei legitur* ; the Condition was for Performance of Covenants in an Indenture made between the Plaintiff and the Intestate ; then the Defendant prayed *Oyer of the Indenture* mentioned in the Condition, though it was not in Court & *ei legitur*, and then he pleaded, and the Plaintiff demurred, so that the Indenture was not in Court ; it should have been produced by the Defendant, under the Hand and Seal of the Plaintiff, and where it was made, and the Substance thereof, that if it should be misrecited, or a wrong Deed set forth, the Plaintiff might plead *Non est factum* : Now in this Case he cannot plead that Plea, because * the Defendant hath not alledged, that it was the Plaintiff's Deed, and for that Reason he cannot crave *Oyer* of it, and get it truly entered, if it should be misrecited. But adjudged, that upon a *General Demurrer*, it should be intended to be the true Indenture, and that it was in Court, and that if the Defendant had endeavoured to trick the Plaintiff, he might have complained to the Court.

(7)
1 Saund. 306.

In Debt upon Bond conditioned for Performance of Covenants in an Indenture : The Defendant craved *Oyer* of the Condition, and pleads, that he hath the Indenture in Court, and that there are no Covenants therein to be performed, *Et hoc*, &c. The Plaintiff prayed *Oyer* of the Indenture, which was entered *in hac verba* ; and it appearing, that there were several Covenants therein to be performed, he demurred to the Defendant's Plea, and adjudged good ; for upon *Oyer* of the Indenture, 'tis made Part of the Defendant's Plea ; so that it appearing judicially to the Court, that he did plead a false Plea, and averred against the Truth of what appeared by the Indenture ; therefore the Plaintiff needs not shew any Matter of Fact in his Replication to maintain his Action, but 'tis more proper for him to demur.

(8)
2 Lev. 113. Cro. Car.
399.
Vent. 297.

Adjudged, that where a *Chose in Action* is created by a Deed, the Destruction of such Deed is the Destruction of the Duty itself ; as in Case of a *Bond*, *Bill*, &c. but 'tis not so where an Estate or Interest is created by a Deed.

Default. Demurrer.

Debt upon Bond; the Defendant pleads, that he delivered it as an *Eſcrow*, *Et hoc paratus eſt verificare*; and upon a Demurrer to this Plea, it was adjudged ill, becauſe he ought to ſhew to whom he delivered it, and then to conclude, *Et ſic non eſt factum*; for this Plea amounts to a ſpecial *Non eſt factum*, and the Plaintiff cannot reply, that he delivered it as his Deed, and traverſes, that he delivered it as an *Eſcrow*. (9)
1 Vent. 9, 210.

Anonymous. Mich. 3 Annæ.

PER Holt Ch. Juſt. A *Date of a Deed* is either expreſs or implied; the expreſs Date is the very Day and Year in which the Deed was made, and this is always intended when in Pleading 'tis ſaid, *bearing Date*; the other is the Implied Date, which is the Delivery. Date of a Deed either
expreſs or implied.

* Default.

* P. 121

Staple *verſus* Heydon. Trin. 2 Annæ. B. R. 2 Ld. Raym. 922.
S. C.

THIS Caſe is reported in 1 Salk. and in the *Modern Caſes*, but not in the ſame Manner as followeth; ſſ. In *Treſpaſs* for breaking his *Wharf* and cutting down his *Fences*; the Defendant pleaded, that one *Grey* was poſſeſſed of this *Wharf*, and a *Timber-yard* adjoining, for 90 Years, and had and uſed a *Way from the Timber-yard over this Wharf to the Thames*, and being ſo poſſeſſed, did demife the *Timber-yard* to this Defendant for ſeven Years; and that the *Fence* being thereon erected to ſtop his *Way*, he cut it down, and that *he had no other Way to the Thames*. The Plaintiff replied, that he (the Defendant) *had another Way to the Thames*; upon which they were at Iſſue, and the Inqueſt was taken at the *Niſi prius*, by Default of the Defendant; but the Iſſue, whether he had a *Way to the Thames*, or not, being *immaterial*, the Court was moved for a *Repleader*: It was held, that this was an immaterial Iſſue; but it had been otherwiſe, if the Defendant had pleaded, that he had no other *Way to the Timber-yard*, but that there could be no *Repleader*, becauſe by this Default the Defendant was out of Court; then it was urged, that the *Treſpaſs* being not juſtified by the Defendant it was confeſſed, and therefore Judgment ought to be given againſt him upon his Confeſſion; and not upon the Iſſue and Verdict; ſo is 3 Cro. 214. 1 Leon. 68. But *per Holt Ch. Juſt.* where the Defendant confeſſeth a *Treſpaſs*, and avoids it by ſuch Matter as can never be made good by any Manner of Pleading, there Judgment ſhall be given againſt him as upon his own Confeſſion, without any Regard to the Iſſue, and ſo is that Caſe in 3 Cro. But where the Defendant avoids and juſtifies by ſuch Matter as would have been ſufficient, if it had been well pleaded, (which is this very Caſe) this, if ill pleaded, ſhall not be taken for a Confeſſion of the Plaintiff's Action; to which *Powell Juſtice* agreed, for this was no more than a *Nient dedire*, and not a plain and expreſs Confeſſion. (1)
1 Salk. 216. Mod.
Caſes 1. Where the De-
fendant is out of Court
by Default there can be
no Repleader.

* Demurrer.

* P. 122

Anonymous.

PER Holt Ch. Juſt. There were *Special Demurrers at Common Law*, but they were never neceſſary but in Caſes of *Duplicity*, and therefore they were ſeldom practiſed; for as the Law was then taken to be upon a *Special Demurrer*, the Plaintiff ſhould ſhew the Reaſon of making the Statute Party (1)
Of Special and General
Demurrers, and the Rea-
ſon of making the Statute
Party

Departure.

Party could take Advantage of no other Defect in the Pleading, but to that which was specially assigned for Cause of his demurring.

(2)

But upon a *General Demurrer* he might take Advantage of all Manner of Defects, that of *Duplicity* only excepted; and there was no Inconvenience in such Practice, for the Pleadings being at Bar *vir a voce*, and the Exceptions taken *ore tenus*, the Causes of Demurrer were as well known upon a General Demurrer as upon a Special one; therefore after the Reformation, when the Practice of Pleading at Bar altered, the Use of General Demurrers still continued, and thereby this publick Inconveniency followed, that the Parties went on to argue a General Demurrer not knowing what they were to argue, and this was the Occasion of making the Statute 27 *Eliz.* by which 'tis enacted, that the Causes of Demurrer should be known in all Cases, and this was restorative of the Common Law.

(3)

Kiel. 76. Allen. 18.

3 Cro. 75.

Demurrer to the *Evidence* admits the Truth of the Fact, but denies its Effects in Law; and if such Demurrer is at the *Affises*, it shall be tried and determined in *B. R.* or in *C. B. &c.* and if the Demurrer is upon Written Evidence, the Plaintiff must join or waive it; otherwise, if it is upon Parol Evidence.

(4)

1 Lev. 76.

Many Things have been adjudged ill upon a Special Demurrer, which are otherwise upon a General Demurrer; as for Instance;

In *Trespafs*, the Defendant pleaded a Descent to him as Heir, and did not say *filio & heredi*, or how he was Heir, this is naught on a Special Demurrer.

(5)

So in Debt upon a Bond to save harmless the Defendant pleads *indamnicatum servavit*.

(6)

So *petit judicium si ab actione* instead of *petit judicium & damna*.

* P. 123

* Departure.

Anonymous. Hill. 2 Annæ, B. R.

(1)

Affault laid to be done on such a Day, &c. The Day is not material.

IN *Trespafs, Assault and Battery*, it was ruled by Holt Ch. Just. that where the Plaintiff laid the Affault to be done *on such a Day*, and the Defendant in pleading some Special Matter justifies on another Day, so that now by this Pleading the Day is made material, yet the Plaintiff in his Replication may alledge the Affault to be done on another Day, and that this is no Departure; 'tis true, it hath been held otherwise, but the later Opinions are, that the Day is not material, and that the Plaintiff may maintain his Declaration.

(2)

1 Roll. Rep 388. What is a Departure. 2 Wilson 98.

In Replevin, the Defendant pleads, *liberum tenementum*, and Damage-feasant there; the Plaintiff in his Replication confesses, that the Defendant was *seised in Fee*, but made a Lease dated 26 May to *W. R. habendum* from the Date, for thirty Years; the Defendant rejoined, that the said *W. R.* regranted to him the said Term for thirty Years, *habendum* from the 25th Day of May in the same Month: Adjudged this is a Departure, for the Day is to be excluded, and then there is a Reversion for one Day left in *W. R.* the first Lessee, so that the Defendant is Tenant for Years, Reversion for one Day to *W. R.* Remainder to the Defendant in Fee; now when the Defendant pleaded a Freehold, it must be intended a Freehold in Possession, which he should have maintained in his Rejoinder.

(3)

A *Departure*, in *Latin, Decessus*, is a Going off to new Matter of Justification; as for Instance, where the Defendant pleads no Award made, and then rejoins, it

Deputy. Devastavit

it was not *tendered*; so where he pleads *Non damnificatus*, and then rejoins *de son tort Demesne*, but where in Covenant the Defendant pleads Performance, the Plaintiff replies, he would not attempt; the Defendant rejoins, he was robbed; this was held no Departure. 1 Lev. 85, 127.

That which is pleaded at *Common Law* cannot be maintained by *Custom*, as Sid. 142. (4)
where the Plaintiff brought an Action of *Covenant*; * the Defendant pleaded *In- * P. 124*
fancy, and the Plaintiff replied the Custom of *London* to charge Infants.

But if the Defendant plead a *Statute*, and the Plaintiff replies, it is *repealed* or 1 Lev. 81. (5)
expired, the Defendant may rejoin, that 'tis revived or continued, as the Case is,
and this is no Departure.

Deputy. See Office 8.

Barker *versus* Kett. Pasch. 13 Will. 3. B. R. 1 Ld. Raym. 658.
S. C.

THIS Case is reported in 1 Salk. by the Name of *Parker versus Kett*, to Comyns 84, 85. 1 Salk. (1)
which may be added, as then adjudged, (*viz.*) That a *Deputy* may act in 95. Deputy may act in
his own Name as well as in the Name of his *Principal*; and *Combe's Case* in the his own Name.
ninth Report, is not contrary; for though 'tis there held, that he who acts as an
Attorney must use the Name of his *Principal*, yet the Judgment in that Case is
otherwise.

That where a Man hath an *Interest* and an *Authority*, and doth an Act without
reciting his *Authority*, it may be intended to be done by Virtue of his *Interest*, (2)
as in * *Cleer's Case*; but where a Man hath an *Authority only*, and doth an Act * 6 Rep.
which cannot be good but by Virtue of that *Authority*, it shall be intended to be
done in Pursuance and Execution of that *Authority*, though 'tis not recited so
to be done.

Anno 18 H. 7. the King granted the Office of Remembrancer of the Exche- (3)
quer to one *Robert Blague*, to exercise by himself or *per sufficientem Deputatum*, and. 5 Eliz. Dyer.
Anno 3 H. 8. he was made a Baron of the Exchequer *quamdiu se bene gesserit*,
and yet he still continued to exercise that Office by Deputy.

A Steward of a Manor cannot make a Deputy without Special Words in his (4)
Patent enabling him so to do; because 'tis * an Office of Trust and Knowledge, Plow. Com. 381.
which are Qualities annexed to his Person. * P. 125

Upon a Bill in the *Dutchy Court*, the Question was, Whether a Stewardship 2 Mod. 173. (5)
of a Manor could be granted in Reversion; and adjudged that it might, because
it may be granted in Fee, or for any lesser Estate, and so in Reversion because
it may be granted to be exercised *per se, vel sufficientem Deputatum*; Sir Robert
Howard's Case.

Devastavit.

ADJUDGED, That Payment of an *usurious Bond* is a *Devastavit*, but (1)
a Delivery of Goods fraudulently sold by the Testator himself, is not.

Payment of a *Legacy* before a contingent *Covenant broken* is not a *Devastavit*, (2)
but if after 'tis broken, 'tis a *Devastavit*.

Payment

Devise.

- (3) Payment of a Statute whilst a Writ of Error is depending upon a Judgment precedent to the Statute is not a Devastavit.
- (4) In Equity, the Executor of an Executor is liable as far as he hath Assets, but he is not so at Law; now by the Statute 30 Car. 2. cap. 7. the Executor or Administrator of a wrongful Executor is liable for a Devastavit of the wrongful Executor.
- (5) After Assets found, or Judgment upon a Demurrer, the Sheriff must return Assets or a Devastavit, (i. e.) he shall not return nulla Bona generally, but he may return nulla Bona in the same County.
- (6) An Executor pleaded a Note of 5000 l. which, with Interest, amounted to 7000 l. and a Judgment thereupon not satisfied, this was adjudged ill; for if Interest did run in the Time of the Executor, it was a Devastavit in him to suffer it, unless there was a Defect of Assets, which shall not be intended, and therefore the Defendant ought to have shewed such Defect, if there was any.
- 2 Lev. 40. (7) A Feme Covert, who was Executrix, survived her Husband, she shall be charged for a Devastavit committed or done by him; so likewise if the Plaintiff had recovered against her Husband whilst living, for a Devastavit during the Coverture, and then the Husband dies, the Widow shall be charged for the Damages, but not for the Costs.
- 2 Lev. 161. Feme Covert surviving her Husband shall be charged in a Devastavit by him.
* P. 126

Devise.

- (1) **A D J U D G E D**, that a Devise to W. R. for Life, Remainder to his Heir, is a Fee-simple, for *Heres est nomen collectivum*; but if he add, and to the Heirs of such Heir, it is for Life only, for Words of Limitation being added to the Word Heir, it shall be taken as *designatio personæ*.
- 1 Vent. 215. Devise to W. R. for Life, Remainder to his Heir is a Fee-simple.
- (2) A Devise to W. R. and to the Issue of his Body, if he have no Issue at that Time, 'tis an Estate-tail, and the Word Issue is a Word of Limitation, for otherwise it would signify nothing; but 'tis otherwise if the said W. R. had Issue at that Time, for then 'tis a joint Devise, or if it be the Remainder to the Issue of the Body of W. R. for then they take a Remainder in *presenti*, as Purchasers.
- 1 Vent. 228. Devise to W. R. and to the Issue of his Body is an Estate-tail, if he hath no Issue at that Time.
- (3) A Devise to W. R. and the Heirs Males of his Body; and if he die without Issue, &c. is only an Estate in Tail male, for an Implication of an Estate of Inheritance shall never ride over an expresse Estate limited before.
- 1 Vent. 230. Devise to W. R. and the Heirs Males of his Body, is an Estate in Tail male.
- (4) A Devise to W. R. for Life, and afterwards to his Heirs male, is an Estate-tail; but it would not be so if the Estate was limited to his Heir male, and the Heirs of the Body of such Heir male.
- 1 Vent. 232. Devise to his Heir male is an Estate-tail.
- (5) The Testator had three Sons, and he devised his Lands to his third Son for Life, and after his Death to the Issue of his Body by a second Wife, with Power to make her a Jointure, this is an Estate-tail, for the Word Issue is *nomen collectivum*, and equivalent to Heir.
- 1 Vent. 225. To the Issue of his Body is an Estate-tail.
- (6) * The Testator devised a Moiety of his personal Estate to his Wife, and then several Legacies to others, and the Residue to another. *Et per Curiam*, the Wife shall have a full Moiety, and then the Debts shall be paid and deducted out of the other Moiety, if that be sufficient; and if there is Money, Bonds and a Lease for Years, the Wife shall have a Moiety of the Lease
- Ch. Rep. 16. Devise of a Moiety to the Wife, she shall have a full Moiety.
* P. 127

Devise.

The Husband devised his Goods to be sold for the raising Portions for his Daughters, and that if the Goods were not sufficient for that Purpose, then the same to be raised out of the Rents, Issues, and *Profits of his Lease Lands*; the Question was, whether the Leases might be sold; if the Goods were not sufficient? *Et per Finch Lord Chancellor*, the Devise of the *Annual Profits* gives no Power to sell, but a Devise of the *Profits* doth, and the affirmative Words shall hinder the Power in this Case of a Chattel; as it might in case the Land had been Freehold.

A Writing was made in this Form (*viz.*) *This Indenture made between, &c.* whereas, &c. now in Consideration of 5 s. he bargains and sells to the Parties to be disposed in Manner following. All the Rest I give and bequeath, &c. and I make the said Parties my Executors, this was adjudged a good Will.

The Father settled a Lease, with Reference to his Will, in which he gave 500 l. to each of his Daughters, to be paid at the Age of twenty-one, and if any or all died before that Age, *then to others*, but devised no *Maintenance* to them till their Portions became payable. *Et per Curiam*, a Maintenance cannot be decreed, because of the Devise over.

Fisher *versus* Nicholls.

THE Construction of Wills is more favoured in Law to fulfil the Intent of the Testator, than any Deed or Conveyance executed by him in his Lifetime.

Wherefore, where a Man by Deed gives Lands to *W. R.* and *his Assigns for ever*, this is only an Estate for Life; but in a Will these very Words make an *Estate in Fee*.

So a Devise to *W. R.* being his eldest Son, and his Heirs, *after the Death of his Wife*, this is a good Estate for Life *by Implication* in the Wife; but 'tis not so in a Deed.

Now *per Holt Ch. Just.* The Reason of this Diversity is not only, that the Testator is intended to be *inops Concilii*, but because a Devise is not a Conveyance by the *Common Law*, but by the *Statute*; 'tis true, there were Devises before the Statute * of *H. 8.* but those were not by *Common Law* but by *Custom*, as in Cases of *Burgage Lands*; now as Custom enabled Men to dispose of their Estates in this Manner, contrary to the *Common Law*, so it exempted this Kind of Conveyance from the Regularity and Propriety required in other Conveyances; and thus it came to pass, that Wills upon the Statute, in Imitation of those by Custom, gained such favourable Construction.

Adjudged, that when the Devise was in these Words, *I give all to my Mother*, that by these Words the Heir was not disinherited, because 'tis uncertain what was intended by that Word *All*; though it was insisted, that it included the whole Estate both Real and Personal, for *qui omne dat nihil excipit*.

Devise to his eldest Son for Life, and if he die without Issue living at the Time of his Decease, then to his second Son and his Heirs; but if his eldest Son hath Issue living at his Death, then the Fee-simple shall remain to his Right Heirs for ever; adjudged, this is an Estate for Life in the eldest Son, which is not drowned in the Reversion he hath as Heir, and that the Remainder to his Right Heirs is not executed but contingent.

The Wife was *Tenant for Life*, Remainder to the Right Heirs of the Husband, who devised his Lands to the Heirs of the Body of his Wife, if they attained to the Age of 14 Years, and died without Issue; this is an executory Devise, and no Remainder to the Heirs of the Wife; for though she hath an

Descent.

Estate for Life, yet that was not created by the Devise ; but this is a new Estate, and not joined to that of the Wife.

(14)
1 Vent. 207.

Adjudged, That Wills appointing a *Guardianship* of a Child upon the Statute of *Car. 2.* cannot be proved in the Ecclesiastical Court ; neither can they prove Wills there for Lands, but of Goods and Lands they may.

* P. 129

* Descent.

(1)
1 Vent. 416.

IN immediate Descents there can be no Impediment, but what arises in the Parties themselves.

(2)

The Grandfather is an Alien or attainted, and hath Issue the Father who hath Issue a Son, and both Denizens, the Son shall be Heir to the Father, notwithstanding the Disability of the Grandfather ; otherwise if the Father had been attainted.

(3)
1 Vent. 413. 1 Inst. 87.
contra.

An *Alien* hath Issue *Two Sons*, both *Denizens*, the one may be Heir to the other, though neither of them could be Heir to the Father ; for the Descent between the Brothers is immediate, and there is no Disability in them, though there is in the Father.

(4)
1 Vent. 416, 428. Co.
Lit. 8. a.

A Father *attainted* hath two Sons, the one may be Heir to the other, for the *Descent* is *immediate* ; and though the Father is the *medium differens sanguinis*, yet he is not the *medium differens hereditatis*.

(5)

In *immediate Descents*, a Disability by Attainder or being an Alien, not only in the Parties, but in any intermediate Ancestor, through and by whom the Descent is made, is an Impediment, and obstructs the Descent.

(6)

There were *three Brothers*, all *Aliens* ; the two Youngest were *naturalized*, and the eldest had Issue, then the third Brother died. Adjudged, that his Land cannot descend to his eldest Brother, or to his Issue, because he was incapable himself, and his Issue cannot come in but by Representation ; so they shall descend to the second Brother.

(7)
• 1 Salk. 243.
Lamb. 167. Seld. Edm.
184.

Per Holt Ch. Just. in his Argument in the Case between * *Clements and Scudamore*, all the Lands in *England* were of the Nature of *Gavelkind* before the Conquest, and descended to all the Issue equally ; but after the Conquest, when *Knights Service* was introduced, the Descent was restrained to the eldest Son, for the Preservation of the Tenure.

Seld. de Success. cap. 23.

But in both Cases, Succession by Right of Representation was allowed, and so it has been in all Nations.

* P. 130

* Discontinuance of Action. See Issues joined, 9.

Salisbury versus Proctor. Hill. 8 Will. 3. B. R.

(1)
Discontinuances are helped after Verdict. 5 Mod.
304.

AN Action was brought against two Defendants, one joined Issue, and the other demurred ; the Issue was tried, and there was a Verdict against that Defendant ; so that no Day was to be given to him ; but as to the other, Day should be given and *Continuances* entered till Judgment, but none being entered, a Writ of Error was brought, and these *Discontinuances* were assigned for Error ; for being after Verdict they could not be helped by the Verdict. But

Discontinuance of Action.

per Holt. Ch. Just. Discontinuances are helped as well after the Verdict, as before; and so it hath been adjudged, for the Statute saith, *Where the Fact is tried*, without relating to Discontinuances before more than after a Verdict.

Philer *versus* Boson. Hil. 3 & 4 Will. 3. B. R.

ERROR on a Judgment in the Court of Excester; the Error assigned was the Want of a Continuance, for it was *ad proximam Curiam*, which is ill in an Inferior Court; but *per Curiam*, the Judgment being given upon a Verdict this Discontinuance is aided; for the Statute of Jeofailes extends to Inferior Courts, and must be favourably construed to give a Remedy, and the Words are, any Discontinuance, Miscontinuance or Misconceiving of Process, which are general Words, and applicable to all Courts of Law.

* Anonymous. Pasch. 5 Will. 3. B. R.

IN Trespass and Battery against Husband and Wife, the Original, as recited in the Declaration, was of a Battery only at one Time, but the Declaration itself was of several Batteries done by them at several Times, to which several Batteries the Defendants pleaded; and the Plaintiff replied as to one of them only, upon which they were at Issue, and it was found for the Plaintiff: *Et per Curiam*, the Original not being set out by craving Oyer, we will intend it to be Right, but misrecited at the Top of the Declaration; and the Plaintiff not replying to one of the Batteries, is but a Discontinuance, which is helped by the Verdict.

After a Demurrer argued, the Court will not give Leave to *discontinue* in an Action of a Debt upon a Bond to perform an Award.

But 'tis not so in an Action of Debt for an Escape.

Nor in an Action of Debt upon a Bail Bond, nor in Debt upon a Bond to account, nor in an *Assumpsit* upon an Accompt stated.

There shall be no Discontinuance before Judgment in the King's Case, and therefore, if after Issue joined and tried for Part, it should be moved in Arrest of Judgment, that there is a Discontinuance as to the Part; this may be aided, for the King may either take Issue upon it, or enter a *Nolle prosequi* to help the Discontinuance.

Miscontinuance is a Wrong doing, but a Discontinuance is not doing a Thing; as *per Holt Ch. Just.* A. sues the Hundred for the Robbery of B. his Servant, the Hundred imparles, and *idem dies dat' est præd.* B. now after Verdict, the Defendant is *sine die* in Court, unless 'tis to move in Arrest of Judgment.

After a Special Verdict the Court may give Leave to *discontinue*, for 'tis not a complete Verdict, but this is a Favour.

Discontinuances are either to the Prejudice of the Heir, or of the Successor, or of the Wife, or of him in Remainder or Reversion, or of the Jointress. *Per Stat. 11 H. 7. cap. 20.* or against the Tenant by Curtesy, with Warranty by the Statute of Gloucester, cap. 13.

* A Discontinuance to the Prejudice of the Successor is remedied by the Statutes 1 & 13 Eliz. and 1 Jac. cap. 3.

A Discontinuance to the Prejudice of the Heir is hindered by the Statute 32 H. 8, by which 'tis enacted, that the Wife or Heir may enter.

But

Dissenters, &c.

(13) But *Discontinuances* to the Prejudice of Remainder-men and Reversioners still continue.

(14) Some Discontinuances displace or divest the Estate only, others not only displace and divest it, but take away the Entry, and this is properly a Discontinuance, and 'tis where he who aliens hath an Inheritance, either in his own Right or in the Right of another, as Tenant in Tail; as for Instance, where the Husband is seised in Right of his Wife, for they not only divest the Estate, but put the Wife or Issue to their Action, by taking away their Entry.

(15) Some Discontinuances gain a *Reversion in Fee determinable*, and some an *absolute Fee*; if Tenant in Tail makes a Lease for the Life of the Lessee, this is a *Discontinuance* of the Estate-tail and the Reversion, and therefore the Tenant in Tail hath gained a tortious Reversion in Fee, but determinable upon the Life of the Lessee.

(16) For if Tenant in Tail make a Gift in Tail to *W. R.* if he die without Issue, the Discontinuance is determined; but if he make it in Fee, this is a Discontinuance for ever.

(17) *Tenant for Life*, Reversion to *W. R.* in Tail, who bargained and sold to *W. W.* in Fee, and then levied a Fine of his Reversion to *B.* in Fee; adjudged, that *W. W.* had nothing by the Bargain and Sale, but an Estate for the Life of his Bargainor descendible to his Heir as a special Occupant: But the Fine having only barred and extinguished the Estate-tail, and having passed nothing to the Cognisee, the Estate of the Bargainee is become a base Fee, descendible to his Heirs as long as the Bargainor has Heirs of his Body. See *Took* versus *Glascock*.

(18) The Husband covenanted to *stand seised* to the Use of himself for Life, Remainder to his Wife for Life, Remainder to the Heirs-Males of their two Bodies, Remainder to his eldest Son *W. R.* who was born of the first Venter, &c. afterwards the Husband and Wife levy a Fine to *W. W.* in Fee, *with Warranty*, and die without Issue-male, by Reason whereof the Estate * descended on *W. R.* the eldest Son of the Cognisor: adjudged, that this *Fine and Warranty* was no Bar, because a Warranty cannot be a Bar to the Estate-tail of *W. R.* the eldest Son, unless that Estate was *discontinued*, and it could not be *discontinued*, unless the Estate-tail to the Cognisor was *discontinued* and *displaced* by the Fine and Warranty; and here the Estate-tail to the Husband and Wife was not *discontinued*, because they were not seised of it at the Time of the Fine levied; for they were not seised in their Demesne as of Fee-tail, but the Husband was Tenant for Life, Remainder to the Wife for Life, Remainder to the Heirs-Males of their two Bodies, so that these are distinct Estates which cannot unite, and by Consequence the Estate for Life is not drowned in the Estate-tail. See the Case, *Stephens* versus *Britteridge*.

* P. 133

Dissenters, &c.

Hilton versus *Byron*. Pasch. 11 Will. 3. B. R.

(1) Criminal Case not within the Statute, for the Ease of Quakers.

THE Plaintiff *Hilton*, being a *Quaker*, moved for an Attachment against *Byron*, offering to take his *solemn Affirmation*, according to the late Act, that he went in Danger of his Life; but the Motion was denied, unless he would take his Oath in common Form, because this was a criminal Case, and not within the Statute.

Disseisin.

The Queen *versus* Ride. Mich. 3 Annæ. B. R.

A Popish Recusant convicted made his Wife Executrix, and afterwards she was permitted by the Spiritual Court to prove the Will; but a Prohibition was granted, because she is disabled by the general Clause of the Statute. *Eliz. cap. 4. Par. 22.* and not enabled by the *Proviso*. (2)
The Wife and Executrix of a Popish Recusant convicted cannot prove his Will.

* The King *versus* Larwood. 1 Ld. Raym. 29. S. C.

* P. 134

INFORMATION against the Defendant for not taking upon him the Office of Sheriff of *Norwich*: He pleaded the Statute *† 13 Car. 2.* that he had not qualified himself, for that he had not taken the *Sacrament* as enjoined by that Statute, according to the Usage of the Church of *England, &c.* The Attorney-General replied, that he was obliged by Law, and ought to have received the Sacrament, *&c.* The Defendant rejoined, that he was a Protestant Dissenter, and exempted by the Toleration-Act, which he set forth; and upon a Demurrer to this Rejoinder it was adjudged, that this is a private Act, of which the Court cannot take Notice without Pleading it; that by several other * Statutes all Persons are to observe the Discipline of the Church of *England*; that the Law took no Notice of Dissenters before this Act of Toleration, which extends only to such Dissenters who take and subscribe the Declaration at the Quarter-Sessions; that the Statute *13 Car. 2.* now pleaded by the Defendant, doth not exempt Men from serving in Offices to which they were obliged before that Act was made, but to qualify them to execute it, and that the Subject cannot be exempted from this Office, but by Act of Parliament or a Grant from the King. (3)
4 Mod. 269. 1 Salk. 167.
† Cap. 1. The Subject cannot be exempted from the office of Sheriff, &c.
* 1 & 23 Eliz.

Disseisin.

THE Lessor made a Lease to *W. R.* for eighty Years, to commence next *Michaelmas*, if *W. W.* should so long live, and after the Death of *W. W.* for thirty-one Years longer: *W. R.* the Lessee, entered before *Michaelmas*, and continued the Possession afterwards; the Lessor entered upon him, and then the Lessee assigned over the Term: *Et per Curiam*, the Entry of *W. R.* the Lessee before *Michaelmas*, was a Disseisin to the Lessor and not a Possession by Virtue of the Lease; and therefore the Entry of the Lessor did not disturb the Possession of the Term, for in that respect he is not possessed but only by the Disseisin, which is hereby purged, and by Consequence the Term is well assignable. (1)
1 Lev. 45, 270.

* So 'tis if a Stranger had entered on the Lessee, that would have turned the Term to a Right, because he was not possessed by Virtue of the Term. * P. 135
(2)

But if Lessee for Years had staid till *Michaelmas Day*, and then had entered, and afterwards the Lessor had entered on him, it would have turned the Term to a Right, because he had a Possession by Virtue of the Term, which being devested he cannot assign such Case before Entry.

Page *versus* Heyward. Trin. 3 Annæ. Piggot's Recoveries 176.
S. C. full.

THIS Case is reported in 2 Salk. *quod vide*, in which it was held per Holt Ch. Just. That a bare Entry on another, without an Expulsion, makes only a Seisin, so that the Law will adjudge him in Possession who hath the Right, and so are the Words to be understood in a Special Verdict. (3)
2 Salk. 570. Entry without an Expulsion makes only a Seisin.

Distress.

ff. Intravit & fuit inde seifitus prout lex postulat ; but it will not work a *Disseisin* or Abatement, without an *Expulsion*.

Distress.

Stanfitt *versus* Hicks. 9 Will. 3. C. B. 1 Ld. Raym. 280. S. C.

(1)
Where a Distress was after
the End of the Term.

THE Case was, there was a Lease made for *one Year*, and so from Year to Year, as long as both Parties pleased, by Virtue whereof the Lessee entered, and was in Possession for two Years and *an half*, and the Rent being in Arrear the Lessor distrained, and adjudged, that he could not by Law, because by this Agreement there was an Estate for two Years created, and no more; the other was a growing Interest or Estate at Will, which, being a distinct Estate from the first, cannot be * subject to the Arrears of the first. The Reporter tells us the Law is contrary.

* Howell *versus* Bell. Mich. & Hill. 8 Will. 3. C. B.

* P. 136
(2)
Where an Executor may
distrain for Rent in Arrear
to the Testator.

IN *Replevin*, the Defendant avowed, for that *W. R.* was seised of the Place where, &c. in Fee, and being so seised he granted a Rent Charge out thereof to *W. W.* for Life, that *W. W.* is dead, and that he (the Defendant) was his Executor, and distrained in the Place where, for so much Rent in Arrear, and due to his Testator in his Lifetime; but did not aver, that the Place where, &c. was then in the Seisin of the Grantor of this Rent, or any other Person who claimed by, from or under him; and upon a Demurrer to this Avowry *Holt*, Ch. Just. held, that the Executor might distrain either on the Grantor or any other Person, who comes in by or through him, and if the Plaintiff is not liable to the Distress, 'tis more natural for him to shew it in his Replication, for his own Defence. Besides, the Statute which empowers Men to distrain, is a Remedial Law, and therefore ought to be expounded according to Equity, and extended accordingly, and the Words therein being *Executors of Tenants for Life* may *ex vi Terminum* include all Tenants for Life.

Anonymous. Mich. 8 Will. 3. C. B.

(3)
Where Cattle may be dis-
trained, though not levant
and couchant.

IF Cattle escape by the Default of the Owner, on the Lands of the Lessor, he may distrain them for Rent, though not *levant and couchant*; but if such Escape be through the Default of the Lessee, in not *repairing the Fences*, the Lessor cannot distrain them till they are *levant and couchant*; for if the Lessor had the Lands in his own Hands, he must repair the Fences, and consequently he must see, that his Lessee doth it, for he is not to take Advantage of his own

* See the King v. Larwood.

(4)
Where a Distress shall be
made for Utensils of
Husbandry.

Adjudged, that the Rule of the Common Law, which exempts *Utensils, Tools, Instruments of Husbandry, &c.* from *Distress*, holds only in Distresses for Rent Arrear, *Amerciaments, &c.* but doth not extend to Cases where a Distress is given in the Nature of an Execution by any particular Statute, as for *Poor's Rates, &c.*

(5)
2 Lutw. 1380. Where a
Distress is well pleaded.
* P. 137

Trespass for taking two Sheep; the Defendant justifies for Toll (*viz.*) *Quod cepit & distrinxit* the said Sheep for Toll, and the same did carry away, as he lawfully might; it was doubted, * whether this was a good Plea, because he did not say *cepit & asportavit nomine districtionis*; but it seems clearly to be naught, if he had not set forth before that *cepit & distrinxit*.

(6)
2 Lut. 1536. Where two
Distresses cannot be for
one Rent.

In *Trespass* for taking ten Beasts 1 April, and also for taking other twelve more on the said first Day of April: The Defendant pleaded, that the Plaintiff had

Distribution. Divorce.

had a Lease granted to him, rendering Rent, and that there was 70 l. Rent in Arrear, and that he (the Defendant) did take the first ten Beasts for 60 l. Parcel of the said 70 l. and the other *twelve Beasts* afterwards, for 10 l. Residue of the said 70 l. and upon a Demurrer to this Plea, it was adjudged ill; for one cannot avow for *two Distresses* made for one and the same Rent; it was the Defendant's Fault to distrain too little at first.

But the Reporter tells us, that if the Defendant had pleaded, that at the Time of taking the first Distress, there was not sufficient to be taken for the whole Rent, upon the Land, and that the first Distress was but only of such a Value, it had been good.

Distribution.

AN Administrator at Common Law was bound to distribute the Surplus of the Intestates Estate; but this was altered by the Statute 21 H. 8. cap. 15. by which he is not compellable, though he accepted the Administration upon that Condition; and this again is altered by the Statute 22 & 23 Car. 2. cap. 10. by which he is compellable to make Distribution, yet an Estate *pur auter Vie* is not to be distributed, though it be within that Act; as for Instance.

(1)
Administrator bound to make Distribution.

Oldison *versus* Pickering. Mich. 8 Will. 3. 1 Ld. Raym. 96. S. C.

IN this Case it was adjudged, that though an Estate *pur auter Vie* is made *Assets* by the Statute 29 Car. 2. yet 'tis not *Distributable* within the Statute 22 Car. 2. for Distribution of Intestates Estates, because Distribution is a Quality not necessarily included in the Notion of *Assets*, as Payment of Debts is; and this last Statute is only, that Goods and Chattels * shall be distributed; now an Estate *pur auter Vie* is not properly Goods or Chattels, but remains a Freehold, though 'tis *Assets* by the first Statute.

(2)
1 Salk. 464. S. C. Estate *pur auter Vie*, is not distributable.

* P 138

Pett *versus* Pett. 1 Ld. Raym. 571. S. C.

AN Intestate, having neither *Father* or *Mother*, *Wife* or *Children*, but only a *Sister of his Father*, and two Daughters of his Father's Brother; a Motion was made for a *Mandamus* to the Ordinary to make Distribution, who had granted it to his Father's Sister. *Sed per Curiam*, by the Statute 22 Car. 2. there shall be no Distribution amongst Collaterals after Brothers and Sisters Children of the Intestate; for that Statute is a Restraint on the Common Law, and therefore shall not be carried farther than the Letter, and after such Collaterals, it shall go to the next of Kin to the Intestate, which in this Case was to his Father's Sister.

(3)
1 Salk. 250. Administration shall be granted to the Aunt and not Distribution to the Children of the Uncle.

Divorce.

A Divorce *a Vinculo matrimonii* is a Bar of *Dower*; but a Divorce *a mensa & Thoro* is not, for the Marriage still continues, and therefore the Parties thus divorced cannot marry again during their joint Lives.

(1)
Noy 100.

A Divorce for *Adultery* was anciently a *Vinculo Matrimonii*, and therefore in the Beginning of the Reign of *Queen Eliz.* the Opinion of the *Church of England* was, that after a Divorce for *Adultery*, the Parties might marry again; but in *Foliam's Case*, Anno 44 *Eliz.* in the Star-Chamber, that Opinion was changed, and Archbishop *Bancroft*, upon the Advice of Divines, held, that *Adultery* was only a Cause of Divorce *a mensa & thoro*.

(2)
Glan. 44. Bract. 92.
18 Ed. 4. 45.

Debt

Dogs.

(3)
Cro. Eliz. 853.

* P. 139

Debt upon a Bond against *Cecilia Wogan, alias dict' Cecilia*, late Wife of *John Englebert*: The Defendant pleaded, that at the Time of the making this Bond, she was the Wife of *John Englebert*, who was still living, & *sic non est factum*. The Plaintiff replied, that the said *Cecilia* and the aforesaid *Englebert* * were divorced, for that he had another Wife: *Et per Curiam*, the Sentence of Divorce is but declaratory; the Marriage was void, *ab initio*, and therefore the Woman was always sole, and by Consequence her Bond good.

The King *versus* The Lord Lee.

(4)
2 Lev. 138. Wife not separated from her Husband by hard Usage, but he bound to his Good Behaviour.

UPON the Complaint of the Wife of the ill Usage of the Husband, a *Habeas Corpus* was directed to him to bring her into Court, who appearing, and several *Affidavits* being read of the hard and severe Usage, and of her Confinement, and that she was in Danger of her Life; and she her self making Oath of this Matter, the Court bound him with Sureties for his Good Behaviour, but they would not separate and remove her from him.

DOGS.

(1)
1 Cro. 125. 2 Cro. 44.

* 7 Rep. 18. See the Stat. 10 Geo. 3. c. 18. against Stealing Dogs.

† 1 Saund. 84.

THE Law takes Notice of a *Greyhound*, a *Mastiff*, a *Spaniel* and *Tumbrel*, for Trover will lie for them; and though a Man hath a Property in a *Mastiff*, yet the Thing is of so base a Nature, that 'tis not * Felony to steal a *Mastiff*.

Where a *Mastiff* falls upon another Dog, the Owner of that Dog cannot justify the Killing the *Mastiff*, † unless there was no other Way to save his Dog; and therefore in *Trespass* for Killing his *Mastiff*, if the Defendant plead, that the *Mastiff* fell upon the Dog, and that he killed the *Mastiff* lest he should worry the Dog, 'tis naught, for, perhaps, he might have saved him otherwise; but if he plead, that he could not take him off, part them, nor prevent the Worrying of his Dog otherwise than by Killing the *Mastiff*, this is a good Justification: *Et per Curiam*, the Owner of a *Mastiff* is not bound to muzzle him, unless he be found to be mischievous.

(3)
1 And. 135. 2 Cro. 44.
* P. 140

Trespass for Killing his Dog, the Defendant justified, for that he was Owner of a Warren, and that the Dog was there several Times killing Conies, and then was running after them * to kill them: *Et per Curiam*, this is a good Justification, for 'tis the Usage to kill Cats and Dogs in *Warrens*.

(4)
Dyer 25.

If a Dog kill a Sheep, not being used so to do, nor by the Encouragement of another; *sed fortuito*, the Master is not liable, no, though accustomed to kill Sheep, unless the Master did know it.

Chambers *versus* Warkhouse.

(5)
3 Lev. 336. Where a Man may have a Property in a Dog.

* Hob. 283. Dyer 306.
† 2 Cro. 463.

TROVER *de sex Catulis & quatuor Catellis*, after a Verdict for the Plaintiff it was objected, that *Catulis* signified little Whelps, and *Catellis* Whelps of any Sort, as of Dogs, Foxes, &c. besides, a Man cannot have any Property in *Whelps*; *Sed per Curiam*, it shall be intended *Whelps of Dogs*, and a Man may have a Property in a Dog, for *Trespass* lies for taking away * *Canem Venaticam*, and the like Action for killing a † *Mastiff*.

Donatives.

DONATIVES are either by Royal Foundation or by Royal Licence, or by original Agreement with the Ordinary; but after 'tis established, the Ordinary hath nothing to do with it, 'tis visitable by the Patron's Commissioners, it must be resigned to the Patron, no Lapse can incur: But *per Holt Ch. Just.* the Ordinary hath a Power as to the Parson, though not to the Place; for if the Parson marries without a Licence, or commits any Misdemeanor, the Ordinary may punish him in that respect, but he cannot regulate the Seats in the Church; and if the Patron will not present, the Ordinary may compel him; the Parson is exempted from Attendance at Visitations. (1)
The Ordinary hath Power as to the Parson but not to the Place.
Yel. 61.

It has been formerly held, that a Donative may be destroyed by the Presentation of the very Patron; but in *† Ladd and Widdow's Case* it was adjudged by *Holt Ch. Just.* and the Court, that though a Presentation might destroy an Impropriation, it could not destroy a *Donative*, because the Creation thereof * was by Letters Patents, by which the Land was settled to that Parson and his Successors, and he to come in by *Donation*: *Et per Jones Just.* Institution to Churches was not a Temporal but a Papal Institution, which was not received in some Places in *England*; and where it was not received they went on in their old Way and Method, and are called Donatives. (2)
A Presentation will not destroy a Donative.
† 2 Salk. 541.
* P. 141

The Incumbent of a Donative was cited into the Spiritual Court to take a Licence from the Bishop to preach; and the Pretence was, that it was a Chapel, and that the Parson was stipendiary: *Et per Curiam*, If 'tis a Donative, and the Bishop will visit, a Prohibition shall be granted. (3)
1 Mod. 90. Bishop not to visit a Donative.

Double Plea.

Lamplugh *versus* Shortridge. Pasch. 13 Will. 3. B. R. Comyns
115. S. C.

TH E R E is a short Note of this Case in 1 *Salk.* but the Case was thus: It was a Writ of Error upon a Judgment in the Common Pleas in an Action of Covenant, and the Error assigned was for Duplicity; (*viz.*) by Pleading, that by such a Deed *he released and confirmed*, which is double, and so is he *†* granted: *Et per Holt Ch. Just.* where it appears, that the Conveyance pleaded cannot enure by Way of Release and Confirmation, there to plead, that by that Conveyance *relaxavit and confirmavit* is double, because the Deed cannot enure to both Purposes, as a Bargain and Sale, or a Feoffment, but where the same Deed may enure to both Purposes, as a Lease and Release doth, there 'tis not double. 1 Salk. 219. Where a Plea is double, where not.
† 1 Saund. 78. 2 Saund. 97. Sid. 86. 1 Vent. 109.

* Gaile *versus* Betts.

* P. 142

DE B T upon Bond, the Defendant craved *Oyer* of the Condition, which was to pay 40 *l.* so long as the Defendant should enjoy such an Office, by quarterly Payments every Year; then he pleads, that the Office was granted to three for their Lives, and that he enjoyed it as long as they lived, and so long he paid the said Rent quarterly: The Plaintiff replied, that he (the Defendant) *enjoyed the Office longer*, and *that he had not paid the Money* by quarterly Payments; and upon Demurrer to the Replication it was objected, that it was double: *Sed per Curiam*, it is not, for the Defendant cannot in his Rejoinder tender an Issue upon Payment of the Money, because that would be a Departure from his Plea. 1 Mod. 227. Where a Plea is not double.

Ecclesiastical Things and Persons. See Dr. Burn's Eccl. Law.

(1)

ECCLESIASTICAL Courts are either immediately derived from the Crown, as a Court of Commissioners, for by the Common Law the King may grant a Commission to hear and determine Ecclesiastical Causes and Offences, according to the Ecclesiastical Laws, but not to use any temporal Punishment, as Fine and Imprisonment without the Help of an Act of Parliament.

(2)

Or such Courts are not derived immediately from the Crown, and thus the Law hath annexed to certain Officers an Ecclesiastical Jurisdiction as incident to their Office, as in the Case of a *Bishop*, who is *Judex Ordinarius* within his Diocese; and so of an *Archdeacon*; and though the Process runs in the Name of the *Bishop*, yet the Authority and Jurisdiction is from the Crown, like the Process of Counties Palatine, which are in the Name of the *Count*; yet 'tis not to be doubted but the *Palatine Jurisdiction* was originally from the Crown; and therefore the King hath a superintendent Power over these Courts, as he is *Custos utriusq; Tabulae*.

(3)

* P. 143

* Now as to Causes determined in these Courts it hath been held, that *Matrimonial* and *Testamentary* Cases were anciently determined in the *Temporal Courts*, for they are not in their Nature Spiritual; that the Proceedings in these Courts are either between Party and Party, or *ex Officio*, as publick Prosecutions, &c. but these cannot be without a Presentment, and the Party Presenting must be upon Oath, unless it be a publick Person, as a *Parson*, *Vicar*, &c.

(4)

Hob. 78. 1 Vent. 3.

And none but those in Orders can exercise Ecclesiastical Jurisdiction in these Courts by the Canon Law; but now by the Statute 37 H. 8. *Doctors at Law* may; and in such Cases the *Chancellor* of the Bishop, who is usually a *Doctor of Law*, is Judge, and therefore the Bishop himself may sue before him, as the King doth before his Judges, in his own Courts.

(5)

Dean and Chapter.
2 Vent. 225.

By the Usage in *England*, generally the *Archbishop* is *Guardian of the Spiritualities*, *sede Vacante*, in his suffragan Dioceses; but of Common Right, and consequently where such Usage hath not prevailed, as to all Matters of Jurisdiction, except *Ordination*, the *Dean and Chapter* are Guardians of the Spiritualities, and in Cases of Ordination they call in the Aid of the next neighbouring Bishop.

(6)

A *Dean* cannot make a *Proxy* to charge the Possessions of the Church, who is not of the Chapter; but he and the major Part of the Chapter make a Corporation, and their Acts are good and binding, without the Consent of the Rest.

(7)

But a *Dean* and Chapter cannot act, grant or confirm, unless they are *capitulariter congregati & semel in certo loco*, which may be in any Place as well as in the Chapter-house; for what they do at several Times, and in several Places, may be *factum singulorum*, but cannot be the Act of the Corporation.

(8)

Chanter and Præcentor.
1 Lev. 113.

Præcentors of old Foundations are within the enabling Clause of the Statute of H. 8. but Leases made by the *Chanters of Paul's* must be confirmed, for they are *minoris Ordinis* (i. e.) mere Singing-men and not properly Chanters.

* P. 144

* *The Churchwardens of St Bartholomew's Case*. Mich. 12 Will. 3.

1 Wilson 11. 2 Stra.
1192.

ONE *Fishburne* left 25 l. per Annum, for the Maintenance of a Weekly Lecture, and Lecturer to be chosen by the Parishioners, and to preach on what Day of the Week they should like best. The Parishioners fixed on *Thursday*, and chose a Lecturer every Year; and now one *Turton* being Lecturer, and the

Error of Judgments in Superior Courts.

the Parishioners having chosen one *Rainer*, he was opposed by *Turton*, who would not submit to their choice, whereupon the Churchwardens shut *Turton* out of the Church; but the Bishop of *London* determined in Favour of *Turton*, and granted an Inhibition and *Monition*, &c. *Sed per Holt Ch. Just.* a Prohibition was granted to try the Right; for no Man can be a *Lecturer* without a Licence from the Bishop or Archbishop; but their Power is only as to the Fitness of the Person; but not as to the Right.

Error of Judgments in Superior Courts.

Lynch versus Coot.

(1)
IN this Case it was held by *Holt Ch. Just.* that if the Plaintiff in Error lie still after a Writ of Error brought, this is no Discontinuance of the Writ; but that the Defendant in Error hath no other Way but to bring a *Scire facias* against him, to shew Cause *Quare executionem non haberet*; and it will be no Plea for the Plaintiff in Error to plead, that there is a Writ of Error depending, but he must assign his Errors forthwith, after such *Scire facias* brought; and in this Case there is this Difference (*viz.*) If the *Scire facias* is entered on the same * *Roll* with the Writ of Error, then he may assign Errors without a *Scire facias ad audiendum Errores*, otherwise not. Where the Detendant in Error may bring a *Scire facias quare Executionem non haberet.* * P. 145

Finch versus Renew. Mich. 12 Will. 3. B. R. 1 Ld. Raym. 610. S. C.

(2)
IN *Partition*, the Judgment was, *Quod fiat Partitio*; but before the final Judgment was given, a Writ of Error was brought, and it was held, that the Record was not * removed for that Cause, whereupon the Writ of Error was quashed. Where the Record is not removed. * Because the Writ of Error comes too soon, it will not lie till after the Final Judgment (*viz.*) *Quod Partitio facta sit firma.* 2 Bulst. 104, 114. Moor 643. Cro. Eliz. 635. 11 Rep. 38. Stiles 290.

Lampton versus Collingwood. Mich. 6 Will. 3. 1 Ld. Raym. 27. S. C.

(3)
IN a Writ of Error brought by the Bail, it was assigned for Error in a Writ of Error, *coram vobis residen* in B. R. that there was no *Capias* but only a *Scire facias* against the Principal; but it was disallowed, for this is an Error in Fact, but no Error in the Court. (3)
4 Mod. 311 1 Salk. 260.
No *Capias* against the Principal is Error in Fact.

Prinn versus Edwards. Trin. 7 Will. 3. B. R. 1 Ld. Raym. 47. S. C.

(4)
DEBT upon a Judgment; the Defendant pleaded a Writ of Error depending in the Exchequer-Chamber, and so prayed, that *Eat inde fine die quousq;* adjudged an ill Plea, because no Resummons lies in this Case, as it doth in Excommengement, and other Cases. (4)
Writ of Error depending, no good Plea.

Badger versus Loyd. Mich. 1 Annæ B. R. Cited in 2 Ld. Raym. 808. S. C.

(5)
IN this Case it was said, *per Holt Ch. Just.* that it was adjudged, that pending a Writ of Error, the Plaintiff in the Original Action may enter if he can; for though this Writ forecloses the Court, and ties up their Hands, yet it doth not alter the Right of the Parties. (5)
Where the Plaintiff may enter though the Writ of Error is depending.

Error.

Knoll's Case.

(6)
Errors in Fact must be redressed in B. R. and not in Parliament.
* P. 146

PER Holt Ch. Just. 'Tis beneath the Dignity of the House of Peers (that being the Supreme Judicature) to try Matters of Fact; and for that Reason Errors in Fact, of * any Judgments in B. R. must of Necessity be redressed there, and not in Parliament.

Anonymous.

(7)
Where a Writ of Error is brought and no Record certified, &c. the Defendant may have a Writ De Executione judicii.

WHERE a Writ of Error is brought, and no Record certified at the Day of the Return of the Writ, the Defendant in Error taking a Certificate of this Matter from the proper Officer of the Court, where the Writ is returnable, he may take out a Writ *De executione judicii* of Course, and the Party cannot hinder Execution thereupon, without he brings a new Writ of Error

Ball versus Richards.

(8)
1 Vent. 165 Where all must join in a Writ of Error.

ERROR of a Judgment in Ejectment against several Defendants, and the Writ concluded *ad damnum ipsorum*, which must be against all, when it appeared by the Record, that the Judgment was against three, and that all the rest were acquitted; *Per Curiam*, yet the Writ of Error is well brought, for all must join in the Writ, which is only a Commission to examine Errors; and *ad damnum ipsorum* may be intended only of those who were found guilty, viz. that they were damnified by this Judgment.

Error.

Evans versus Roberts. Mich. 2 Annæ B. R.

(1)
Mod. Cases 61. An Inferior Court held, secundum legem mercatoriam juxta consuetudinem Civitatis, good.
* P. 147
* 1 Cro. 46. Saund. 87, 311.

ERROR of a Judgment in the Court at Bristol, the Error assigned was, that the Action there was said to be in a Court held before the Sheriffs and Bailiffs of Bristol, *secundum legem mercatoriam juxta consuetudinem Civitatis prædictæ a tempore cujus contrarium, &c.* whereas *per legem mercatoriam* ought to be before the Mayor of the Staple; but adjudged well * enough, because it was *juxta consuetudinem Civitatis*, like the Case of the Court of * Piepowders: Then it was objected, that the Writ of Error was directed to the Sheriffs to remove *loquelam coram vobis residen*, and the Record removed was *Loquela*, before their Predecessors, Sheriffs: *Et per Curiam*, where a *Fi. Fa.* comes to a Sheriff, and he goes out of his Office before 'tis executed, his Successors may execute that Writ, because the Writ is general, and not directed to any particular Sheriff by Name; but 'tis otherwise if it was directed to a Sheriff by Name; a Writ of Error to the Court of Common Pleas is always directed to the Chief Justice of that Court by Name; and there must be no Variance in such Case, but in the principal Case it was held well enough.

(2)
On a judgment in B. R. a Writ of Error will lie, either in Parliament or in the Exchequer-Chamber.

Adjudged, that upon a Judgment in B. R. a Writ of Error lies, either in Parliament or in the Exchequer-Chamber at the Election of the Party; but upon a Judgment in the Exchequer-Court, a Writ of Error will not lie in Parliament.

(3)
A Writ of Error in B. R. will not lie on a Judgment given in that Court for Error in Law, but for Error in Fact in Civil Cases, but 'tis otherwise in Criminal Cases.

The Defendant was indicted in B. R. and found guilty, and he brought a Writ of Error in the same Court, and assigned Error in Law: *Et per Curiam*, If Judgment is given in B. R. in Civil Actions, a Writ of Error will not lie in the same Court, but only for Errors in Fact triable by a Jury; but upon a Judgment in criminal Cases, Error will lie in B. R. whether the Error be in Fact or Law; but it lies also in Parliament.

Escape.

Adjudged, that where Matter of Fact is insufficiently alledged, *in nullo est erratum* is a Demurrer; so it is if Matter of Fact is alledged against the Record. (4) Vent. 252. Where in nullo est Erratum is a Demurrer.

But if Matter of Fact is well set forth with Matter of Law, it is a Demurrer Where Matter of Fact is as to the Doubtfulness, but that must be specially assigned, or otherwise *in nullo* well set forth with Matter of Law. (5) *est erratum* pleaded, the Matter of Fact will be confessed, and the Matter in of Law. Law referred to the Judgment of the Court.

Where the first Judgment is upon an *insimul computasset*, or upon an *Award*, Bail, where it shall not be and a Writ of Error is brought; there shall be no Bail within the Statute 3 Jac. on a Writ of Error. (6) 1. cap. 8. because these are not Cases within the Words of that Statute, (*viz.*) *Actions founded on Bills or Obligations for Payment of Money.*

But if the first Judgment was in an Action on a Bond for Payment of Money, (7) as *W. R.* should declare was due to him (the Plaintiff) upon Accompt, there he must find Bail on a Writ * of Error brought on a Judgment in such Action; * Yelv. 227. because, though this Writ is *de jure*, yet being generally brought for Delay, the Statute shall be * favourably expounded, and this was an Obligation for Payment of Money; 'tis true 'tis uncertain at first as to the Sum, but reduced to a certainty before the Action brought. * P. 148 *Lev. Mich. 15 Car. 2. Dean and Chapter of St. Paul's versus Capell.*

Anonymous.

P E R Holt Ch. Just. In Courts newly constituted, and which are impowered (8) to proceed in a Method different from the Courts of Common Law, their B. R. may examine their Judgment is not subject to a Writ of Error; but yet B. R. may examine them by *Certiorari* or *Mandamus*. Where an inferior Court proceeds different from the Courts of Common Law. B. R. may examine their Judgments by *Certiorari*, but not by Writ of Error.

Where a Judgment in *C. B.* is affirmed upon a Writ of Error in *B. R.* and afterwards a *Scire facias* is brought on that Judgment, and the Plaintiff obtains a Writ of Error will not Judgment thereon; no Writ of Error lies in the Exchequer-Chamber, because (9) the Record was not in *B. R.* by Bill, as the Statute requires, but by Writ of Error. 1 Roll Rep. 264. Where lie in the Exchequer-Chamber.

Escape.

Sir William Moor's Case. Hill. 2 Annæ, B. R.

A Prisoner escaped, and was retaken upon a Sunday, by Virtue of a Judge's Warrant, usually called an *Escape-Warrant*, by Virtue of the Statute of (1) 1 Annæ; and it was now moved that he might be discharged, for the Taking Mod. Cases 95. 2 Salk. 626. by the Name of Parker v. Sir W. Moor. * Cap. 16. and 5 Annæ, c. 5. Retaking a Person upon an Escape-Warrant, though on a Sunday, is not within the Statute. * P. 149 him upon a Sunday is within the Statute of * Car. 2. which is very true, if this had been a Taking upon an *Original Process*, but * 'tis a Retaking, in the Nature of a fresh Pursuit, and the *Marshal* might retake a Man upon a fresh Pursuit, with, or without a Warrant; and such Retaking, tho' upon a Sunday, is not within the Statute; and if so, he may be retaken by an *Escape-Warrant* upon a Sunday, for the Words of the late Act are general, without any Limitation as to Time; and the Defendant having done a wrongful Act, ought not to be suffered to take Advantage of it. *Nota*, 'Tis held otherwise in *C. B.* and the Barons were divided in the Exchequer.

Escape.

Williams *versus* Cray. Pasch. 7 Will. 3. B. R. 1 Ld. Raym. 40.
S. C.

(2)
4 Mod. 403. 1 Salk. 12.
Executor brought an Action for a false Return of a Fi. fa. brought by his Testator, and good. 1
Roll. Ab. 9'3. a. 2 Cro. 247.

AN Executor brought an Action on the Case against a Sheriff, for a false Return of a *Fieri facias* delivered to him by the Testator; after a Verdict for the Plaintiff it was objected in Arrest of Judgment, that this Action would not lie, because it was only a personal Tort done to the Testator, which *moritur cum persona*: *Et per Curiam*, an Executor cannot have an Action for an Escape upon *mesne Process*, because that is merely personal, but he may for an Escape upon a *Capias ad satisfaciend'*, or for a false Return of a *Fieri facias*, and this by the Equity of the Statute 4 Ed. 3. because the Right being determined after Judgment, the Tort is more than *personal*.

Rich *versus* Doughty. Pasch. 3 Annæ B. R.

(3)
Mod. Cases 154. Where the Defendant was wrong taken by an Escape-Warrant.
* 5 Annæ cap. 5.

THE Defendant escaped out of Prison, and was retaken by Virtue of an *Escape-Warrant* upon the Statute 5 Annæ, by a Rabble, without any Officer, as the Statute directs, and was by them brought to the Sheriff, who detained him by Virtue of that Warrant, and upon an *Habeas Corpus* brought, the Sheriff returned, that *Doughty* was brought to him by *W. R.* and others, to him unknown, by Virtue of a Warrant, &c. and that he (the Sheriff) detained him in Custody *juxta exigentiam Brevis*: *Et per Holt Ch. Just.* this was adjudged an insufficient Return; 'tis true, the Warrant was good, but being illegally executed, the Sheriff ought not to detain him, for he shall not graft a legal Imprisonment upon an illegal one; he ought to receive the Prisoner from no Person but an Officer, or from one under that Denomination.

* P. 150

* Tilden *versus* Palfriman. Mich. 2 Annæ, B. R.

(4)
1 Salk. 213, 345. S. C.
Where a Man is actually in Custody, the Entry of an Action in the Marshal's Book is a good Commencement of the Action.

TH E R E is a short Note of this Case in 1 Salk. 213. and the same again, and in the same Words *fo.* 345. but the Case was thus: *W. R.* being indebted to the Plaintiff upon Bond for 100 *l.* was arrested, and afterwards being in the Custody of the *Marshal*, he escaped, and being retaken upon an *Escape-Warrant*, he was committed to *Newgate*, and having compounded the Debt for 30 *l.* paid to the Plaintiff, he was discharged from that Action by the Plaintiff, and set at Liberty; afterwards *H. H.* another Creditor, finding him at large, arrested him in another Action, and so he was brought to the *Marshal* again, who suffers him to escape the second Time, and afterwards *H. H.* entered an Action against him in the *Marshal's* Book, by *Remanet in Custodia*: *Et per Curiam*, where a Man is actually in Custody, the Entry of an Action in the *Marshal's* Book may be a good Commencement of such Action against the Party, because when he is in Custody there is no serving of Process upon him; but 'tis otherwise where he is at large, as he was in this Case, though it was by Escape, because there you have the Advantage of Process against him; but it was not resolved howlong the *Marshal* shall keep him without a Declaration delivered or Bail filed.

(5)
Jones 144. Where fresh Pursuit and Retaking is a good Plea, and where not.

Case, &c. in which the Plaintiff declared, that *W. W.* was in Execution upon a Judgment, and that the Defendant suffered him to escape (*viz.* at *D.* in *Com. H.*) the Defendant confessed the Judgment, and that the said *W. W.* was in Execution, and that he escaped from him at *S.* in the County of *M.* and that he made fresh Suit after him, *ante exhibitionem billæ præd.* and retook him: *Et per Curiam*, if the Gaoler retakes a Person escaping before any Action brought, he is excused, but 'tis not so if the Action was brought before the Retaking; for he having given the Plaintiff a just Cause of Action, and that being well commenced, shall not be defeated by any subsequent Matter: 'Tis like the Case of an Action of Waste, if the Defendant plead he repaired before the Action brought, 'tis a good Plea, but not afterwards.

Trevivian *versus* Lawrence. Pasch. 3 Annæ, then argued. 2 Ld.
Raym. 1036, 1048. S. C.

SCIRE facias brought by an Administrator on a Judgment in *Trinity Term*, 1 Salk. 276. (1) Where the
Et. (whereas the Judgment was of *Michaelmas Term*) All the Tertenants; Party cannot aver against
except one, appeared, and pleaded *Nul tiel Record*, and Judgment was had a Point tried.
against them upon this Plea to that *Scire facias*, and Execution awarded, and thereupon
the Plaintiff sued out an *Elegit* and *Extent*; and now upon an Ejectment brought at
the Trial, it was discovered, that there was no such Judgment as recited in the
Scire facias, for that was a Judgment in *Trinity Term*, whereas the Judgment was
of *Michaelmas Term* following; thereupon the Jury found all this Matter Spe-
cially. And now it was argued, that there being no such Judgment as that
recited in the *Scire facias*, for that was a Judgment of *Trinity Term*, whereas the
Judgment given in Evidence was of *Michaelmas Term*; this must be a Failure of
the Record, which is very true. But *per Holt Ch. Just.* the *Scire facias* being
returned, and the Defendants having appeared, and pleaded to it *Nul tiel Record*,
and Judgment being given, *Quod habetur tale Recordum*, 'tis now too late to make
this Objection; for the Party is so estopped that he can never aver against it in
the Point tried; even the *Issue in Tail* cannot falsify in a Point tried; And as to
Estoppels, the *Chief Justice* held, that an *Estoppel* in Pleading doth not bind the
Jury, unless it works upon the Interest of the Land. That where a Plaintiff de-
clares upon a Demise (which really was by Indenture) and the Defendant pleads,
Nil habuit in Tenementis; if the Plaintiff take Issue upon that Plea, the Jury,
notwithstanding the Indenture, may find that the Lessor had nothing in the Tene-
ments *tempore dimissionis*, and give a Verdict for the Defendant; but, if instead
of *Nil habuit in Tenementis*, the Defendant had pleaded *Nil debet* and Issue there-
upon, if the Defendant give in Evidence, that the Plaintiff *Nil habuit in Tene-*
mentis, he (the Plaintiff) may in such Case take Advantage of his Indenture, by
Way of *Estoppel*, because he could not have that Advantage * of it in Pleading,
as he might in the other Case; so likewise, if a Mortgagee brings an Ejectment
against the Mortgagor, and he pleads Not guilty, the Mortgagor shall never be
allowed to give in Evidence a precedent Mortgage, he being estopped as to that
Matter. Judgment for the Plaintiff. * P. 152.

Pleddall *versus* Freak. Pasch. 8 Will. 3.

DE B T upon Bond against *William Freak*; the Defendant pleaded his Name (2) Where a Demurrer to a
is *Walter*; the Plaintiff demurred, supposing that the Defendant was *Misnomer* is not good.
estopped by the Record, to say his Name was *Walter*; but Judgment was given
Quod Billa cassetur; for the Plaintiff should have pleaded it.

Holman *versus* Hore.

THIS Case is reported in 1 Salk. by the Name of *Gilman versus Hore*, to 1 Salk. 275. (3) Where an
which may be added (*viz.*) that some *Estoppels* are absolutely conclusive, *Estoppel* is conclusive.
and some by Conclusion give an Interest. The Lessor made a Lease to *W. R.* for
twenty Years, and about a Year afterwards he made another Lease to *W. W.* for
twenty Years; now if there was an *Attornment* to this second Lease, then it
amounts to a *Grant of the Reversion* of the Lessor; but if no *Attornment*, then
'tis a *Lease by Estoppel*: So where a Man makes a Lease to *B.* for twenty Years,
and about a Year afterwards makes another Lease to *C.* for twenty Years, this is a
Lease by *Estoppel*, and the Rent is payable for the whole Term; but if he enter
upon the first Lessee, and then make a Lease to *C.* who is turned out by *B.* 'tis
no Lease by *Estoppel*, but only a Future Interest for the last Year.

Evidence.

* P. 153

* Evidence. See Prohibition, 4.

(1)
1 Lev. 25. Where a
Counterpart of an old
Lease, without Witness,
was allowed as Evidence.

IN *Ejectment*, the Plaintiff gave in Evidence a Counterpart of an old Lease, which he found amongst the Writings of his Grandfather's Title, but there were no Witnesses to this Lease, yet it was allowed good Evidence; for the Deeds about that Time (which was in the Reign of *Queen Eliz.*) were often without any Witnesses.

(2)
1 Lev. 25, 101. An Or-
der, that Administration
should be granted, was
read as Evidence.

The Plaintiff could not produce any *Letters of Administration*, yet to prove himself Administrator he produced the Book of the Spiritual Court, wherein there was an Order entered, that Administration shall be granted to him, and this was allowed to be good Evidence.

(3)
1 Lev. 235. Probate of
a Will given in Evidence,
to prove the Plaintiff
Executor.

Upon an Issue joined whether Executor or not, the Plaintiff, to prove himself Executor, produced the *Probate of the Will*; the Defendant may plead, that the Seal was forged, or that there was a *Repeal*, or that the Testator had *Bona notabilia*, but he cannot give in Evidence, that this was not his Will, or that another is Executor, or that the Testator was *non Compos*; because the Ordinary is Judge of these Things, and his Acts are conclusive, and the Party is estopped to falsify them, as he would do, if this should be admitted to be Evidence.

Anonymous. Hill. 8 Will. 3. C. B.

(4)

ADjudged, that upon *Plene administravit* pleaded, the Defendant cannot give in Evidence Payment of Judgments, &c. since the Issue joined, nor since the Writ purchased. because the Issue is, whether *Plene Administravit* at that Time; but though he cannot give such Payment in Evidence, yet he may plead it.

* P. 154

* Anonymous, Hill. 8 Will. 3. B. R.

(5)

RULED *per Holt Ch. Just.* that upon *Non Assumpsit* pleaded, the Defendant cannot give the *Statute of Limitations* in Evidence, because the Issue is joined in the *Præter-Tense* (*viz.*) upon what was done, and the Evidence only proves the Effect thereof to be now avoided; but upon *Nil debet*, the Statute may be given in Evidence, for it proves, there is nothing now owing according to that Issue.

Lynch *versus* Clerke.

(6)
Where a Copy of a Fine
or Recovery shall be Evi-
dence.

PER *Holt Ch. Just.* The Substance of a Deed cannot be proved, but by the Deed itself, unless 'tis burnt, or lost, or in the Possession of the Plaintiff himself; and if so, then this Matter, as it happens, must be sworn, and that the Deed was executed: and in this Case he said, that a Copy of a *Fine or Recovery*, is good Evidence, so as it be sworn to be a true Copy and examined; so likewise an *old Deed* is good Evidence, without any Witness to swear that it was executed: That wherever an Original is of a publick Nature, and would be Evidence, if produced, an immediate sworn Copy thereof will be Evidence, as the Copy of a *Bargain and Sale*, or of a *Deed inrolled*, of a *Church Register*, &c. but where an Original is of a private Nature, a Copy is not Evidence, unless the Original is lost or burnt: He likewise said, that if the Plaintiff will read the Defendant's Answer in Chancery against him in Evidence, the Defendant may likewise take Advantage thereof, for all is Evidence, or none.

Evidence.

Hoe versus Nelthrope. Hill. 8 Will. 3. B. R. 1 Ld. Raym. 154.
S. C.

IN this Case it was held *per Holt Ch. Just.* that the Copy of a *Probate of a Will* is good Evidence, where the Will it self is of Chattels, for there the *Probate* is an Original taken by Authority, and of a publick Nature; otherwise, where the Will is of Things in the *Realty*, because in such Case the Ecclesiastical Courts have no Authority to take Probates, therefore such Probate is but a Copy, and a Copy of it is no more than a Copy of a Copy. (7)
Where a Copy of a Probate of a Will is Evidence.

* *Man versus Cary.* Pasch. 9 Will. 3.

THE Question being proposed in this Case to the Justices of the Common Pleas, whether the Copy of a *Bank-Bill* remaining upon the File in the Bank of *England*, was good Evidence, or not: They all agreed that it was, and that it was like the Copy of an *Enrollment of a Parish-Register*, the Bank being a publick Body established by Act of Parliament for publick Purposes. * P. 155
(8)
Copy of a Bank-Bill upon the File in the Bank of England is Evidence.

Anonymous.

PER Holt Ch. Just. where a Person is convicted of *Perjury upon the Statute*, and afterwards pardoned, yet he cannot be a Witness, for the Punishment is Part of the Judgment appointed by the Statute; but 'tis otherwise if the Conviction was at Common Law. (9)
Convicted of Perjury, though pardoned, cannot be a Witness.

Thruston versus Slatford. Mich. 12 Will. 3.

IN this Case it was held, that a *Bill of Exceptions* would lie at a *Trial at Bar*, as well as at the *Nisi prius*, for the Words of the Statute are, that the Justices shall sign it, which Word *Justices*, being in the plural Number, cannot be well understood of any other Justices than those of the Courts at *Westminster*: And *per Holt Ch. Just.* where a Judge admits that for Evidence which is not Evidence, there the Party must not demur, for if he doth, he admits the Evidence to be good, but denieth the Effects of it, and therefore in such Case he must bring his Bill of Exceptions; and so it is if the Judge will not admit that for Evidence which is Evidence. (10)
1 Salk. 284. Where the Party must not demur to the Evidence.

Adjudged, that where there is Special Matter to avoid the Plaintiff's Action, which the Defendant cannot give in Evidence upon the General Issue; in such Case he must plead it specially, but he needs not where he may give it in Evidence upon the General Issue. (11)
2 Vent. 295.

So wherever there is a mere Matter of Fact to avoid the Plaintiff's Action, the Defendant may plead the General Issue and give it in Evidence; but if that Matter of Fact contains likewise Matter of Law, the Defendant may either plead specially or generally, and give the Special Matter in Evidence. (12)

* Adjudged, that where the Issue is Payment at the Day and Place, in such Case, Payment before the Day, or at any other Place, is good Evidence, for Payment before the Day is Payment at the Day. (13)
* P. 156

So if the Issue is *Assets* at such a Place, 'tis good Evidence to prove Assets at another Place; for Assets any where is Assets every where. (14)

Exception.

Cudlip *versus* Rundall. Hill. 3 Will. 3. B. R.

(1)
4 Mod. 11. That it was
an Action on the Case.
What shall not be an Ex-
ception out of an Excep-
tion.

COVENANT, &c. in which the Plaintiff declared, that he being possessed of a Messuage, demised it to the Defendant for seven Years, and that he so negligently kept his Fire that the House was burnt; upon *Non demisit* pleaded, the Jury found a special Verdict, (*viz.*) that the Plaintiff demised the said House to the Defendant, with all Out-houses, &c. *Except the New House* lately built upon the Premises, for the Use of the Plaintiff and his Family, and not to be let to any other Person whatsoever; and at all Times when the Plaintiff should not dwell there, to be used by the Defendant and his Assigns: The Question was, what Estate or Interest the Defendant had in this *New House*, and adjudged, that he was only Tenant at Will, because the *New House* was well excepted, which Exception was not avoided by the Words which follow, (*viz.*) *And at all Times to be used by the Defendant when the Plaintiff doth not dwell there*; for that Sentence doth not enure as an *Exception out of an Exception*, which sets the Matter at large, but only as a Declaration of the Plaintiff's Intention in making the Exception, therefore this Action will lie.

* Wilson *versus* Armorer.

* P. 157
(2)
1 Vent. 87. 78, 106.
Raym. 207. 1 Lev. 287.
See 1 And. 129. S. P.
Exception, where it
shall be rejected.

DE B T against an Heir, who pleaded, that he had *nothing by Descent*, &c. The Jury found a Special Verdict, that the Father was seised in Fee, and made a Feoffment to several Uses (*Excepting two Closes for his own Life*): Adjudged, that these Closes *descended* to the Heir, because there was no Use limited in the Closes; besides, this Exception being an entire Sentence, and having that Effect which the Law will not admit, because the Whole was before limited in Use, therefore it shall be rejected; 'tis like the Grant of an Advowson excepting the Presentation for the Life of the Grantor, which is wholly void; but 'tis not like a Lease of a House, excepting a Chamber *to and for the proper Use of the Lessor*, because those are Words which give the Lessor an Authority to dispose of the Chamber at his Will and Pleasure.

Exchange.

Anonymous.

(1)

PERMUTATIO Vicina est Empitoni, but Exchanges were the original and natural Way of Commerce, precedent to Buying, for there was no Buying till Money was invented; now, in exchanging, both Parties are Buyers and Sellers, and both equally Warrant; and as this is a *natural* rather than a *civil Contract*, so by the *Civil Law*, upon a bare Agreement to exchange, without a Delivery on both Sides, neither of the Parties could have an Action upon such Agreement, as they may in Cases of selling; but if there was a Delivery on one Side and not of the other, in such Case the Deliverer might have an Action to recover the Thing which he delivered, but he could have no Action to enforce the other to deliver what he agreed to deliver, and which the Deliverer was to have *in Lieu* of that Thing which he delivered to the other.

(2)
Where the Word Exchange
is necessary in the Con-
veyance.

* P. 158

* In Exchanges of Land the Word Exchange is necessary in the Conveyance, because it imports a Special Warranty in respect of the mutual Consideration of the Lands exchanged; 'tis likewise necessary, that the Estates of both Parties be equal in Title, as if one hath an Estate in Fee, the other must have the like Estate; but 'tis not necessary that their Estates should be equal in Value.

Adjudged

Execution.

Adjudged, that if *G. D.* exchange five Acres with *W. N.* and afterwards the said *W. N.* is evicted of one of those five Acres which he had in Exchange, the Whole is defeated, and *W. N.* may enter on his own again, & *sic e converso*, if *Bultard's Case*.
G. D. be evicted of one of his five Acres.

(3)
Cro. Eliz. 903. Yel. 8.
Moor 665. 4 Rep. 121.

Execution.

THE Plaintiff may take out Execution against the *Bail*, and if they pay Part of the Money, he may discharge them, and take Execution against the *Principal* for the rest; but he cannot proceed against the *Principal* till the *Bail* are discharged.

(1)

Judgment against four *Defendants*, if afterwards three surrender themselves, the *Bail* is still liable; but if the Plaintiff take three in Execution, the *Bail* are not liable, because in such Case they cannot bring them in.

(2)

Upon a *Fi. Fa.* the Defendant may pay the Money to the Sheriff, and may plead, that it was levied; but if he be in Execution he cannot pay it to the Sheriff and plead it to a new *Action of Debt*, neither can he pay it to the Sheriff if he is taken upon a *Ca. sa.* because he hath no Authority to receive it.

(3)

The Plaintiff obtained a Judgment for 2000 *l.* and brought an *Elegit*, and levied 400 *l.* he cannot have any other Execution, but he may have an *Action of Debt upon the Judgment* for the Residue of the Debt, because 'tis not satisfied, and the *Elegit* is only by the Statute as a farther Remedy; and in the principal Case, the Extent being only of a Term for Years, the *Elegit* was executed but as a *Fieri facias*.

(4)

* Where Goods are taken in Execution, the Property of the first Owner ceases by the Seizure.

(5)

1 Vent. 53.
* P. 159

If a *Prisoner* escapes, who was in Execution, his Creditor may retake him by a *Ca. sa.* or bring an *Action of Debt* on the Judgment, or a *Scire facias* against him, for he hath still an Interest in the Body, as a Pledge for the Debt.

(6)

1 Vent. 269.

Where a *Fi. fa.* is delivered to the Sheriff to levy 20 *l.* and he takes an entire Thing in Execution (*viz.*) a Horse worth 30 *l.* and sells it for so much, and returns, that he levied the 20 *l.* he may retain the other 10 *l.* till the Defendant demands it, for he (the Sheriff) is not bound to look after the Defendant; but if on a *Fi. fa.* for 20 *l.* he levy five Oxen, worth each of them 5 *l.* and sell them for so much, the Defendant may have an *Action of Trespass* against the Sheriff.

(7)

Noy 59.

Smallcomb *versus* Buckingham. 1 *Ld. Raym.* 251. *S. C.* Comyns
35. *S. C.*

IN this Case it was held, that at Common Law, all the Lands were bound which the Party had at the Time of the Judgment given against him, and the Judgment always related to the first Day of the Term; but now, by the Statute 29 *Car. 2.* the Judgment binds the Lands (as to Purchasers) from the Time it was signed.

(8)

1 *Salk.* 320. Judgment binds from the Time it was signed.

So at Common Law, the Goods were bound from the *Teste of the Execution*, though that might be antedated, and if the Defendant sold the Goods after the *Teste*, or died, the Sheriff might levy them; but now, by the aforesaid Statute, they are only bound from the Delivery of the *Writ of Execution* to the Sheriff, but not

The Goods are bound from the Delivery of the Writ of Execution to the Sheriff, and not from the *Teste*.

Executor.

not absolutely bound in all Cases; for if after the Delivery of the Writ, and before Execution executed, the Defendant becomes Bankrupt, that will hinder the Execution.

Anonymous.

(9)
Where there needs no Liberate on an Extent.

RULED, that where an *Extent* is upon a *Statute-Merchant*, there needs no *Liberate*, for the Sheriff may deliver all in Execution without it; but where an *Extent* is upon a *Statute-Staple*, or upon a *Recognizance*, there must be a Return made of such an Extent, and then a *Liberate*, before there can be a Delivery in Execution; 'tis for this Reason, that a *Statute-Merchant* is said to include a *Liberate*, and that the † Sheriff before the * *Liberate* upon the Extent, may take his Fees, but not where the Extent is upon a *Recognizance*.

† Hutt. 53.
* P. 160

Anonymous.

(10)
Where a Sheriff may be a Trespasser, but the Execution is good.

WHERE Judgment is given against one, who is in View of the Court, or in *Westminster Hall*, it may be executed immediately, and the Party taken or sent for into Court and committed; and it was said, that if a Sheriff execute Process in *another County*, 'tis erroneous and void; so if he execute it in a *County Palatine*; but if he execute it within a *Franchise* in a County, or in the *Isle of Ely*, 'tis good, for being but a *Liberty*, 'tis still Part of the County; and though the Sheriff may be a Trespasser, yet the Execution shall stand good.

Executor.

(1)
2 Lev. 26.

COVENANT with the Feoffee, his *Heirs and Assignes*, that they should quietly enjoy; the Feoffee was evicted and died. Adjudged, that his Executor may bring an Action of Covenant, for the Eviction being made to the Testator, he could not have an Heir or an Assignee to this Land; but his Executor represents his Person, who was damnified by the Breach of this Covenant.

(2)
2 Lev. 145.

Debt against *Husband and Wife*, in which the Plaintiff declared upon a *Devastavit* against both of them; and upon a Demurrer to this Declaration, it was held ill, because a *Feme Covert* cannot commit Waste; though if she survives her Husband, she shall be chargeable for Waste done by him.

(3)
1 Vent. 187.

An Executor may bring Trespass, *Quare blada crescentia in vita Testatoris messuit & asportavit*; for Corn standing is a Chattel, and the Mowing and Carrying it away, was one entire Act; but if the Cutting was at one Time, and the Carrying away at another Time, then they are distinct Acts, and he must sue for the Carrying away only.

(4)
* P. 161

* But an Executor cannot bring Trespass *Quare herbam crescentem in vita Testatoris messuit & asportavit*, because Grass growing is Part of the Freehold, and not a Chattel.

(5)
Hardr. 512.

An Executor having *Assets*, may be compelled to redeem a Mortgage, for the Benefit of the Heir at Law; he shall be likewise compelled to pay a Debt for which the Heir was liable.

(6)
2 Vent. 184.

In Debt for Rent against an Executor, though 'tis brought in the Detinet, and the Term expired, he cannot plead a Bond of the Testator yet unsatisfied, because the Debt for Rent is of as high a Nature as the Debt upon the Bond. The Defendant cannot wage his Law in either Action, and a Bond given for

Executor.

for the Rent would not extinguish the Action of Debt, which arises upon the first Contract.

Whitehall *versus* Squire. Pasch. 2 Annæ.

THE Case was, A Man possessed of a Horse put it to Pasture to the Defendant, and died Intestate; *W. R.* desired the Defendant to bury him, and agreed, that he should have the Horse for his Charges, &c. accordingly the Defendant buried him, and laid out more Money than the Horse was worth; afterwards *W. R.* took out Administration, and now brought an Action of Trover for the Horse: Two Judges were of Opinion, that the Action would not lie, because the Plaintiff consented and agreed, that the Defendant should have the Horse. But *Holt Ch. Just.* held, that the Action would lie, because the Defendant was an *Executor de son tort*; 'tis true, such an Executor is only liable in Respect to the Value he hath received, and when he hath paid to that Value, he is no farther liable as to Creditors; but as to the Executors, or to a lawful Administrator, he is still liable in Respect of the Tort, in meddling with what by Law belonged to them, and they may bring Trover against him; yet Evidence being given of what he justly paid, he may be recouped.

(7)
1 Salk. 295. Executor de son Tort liable to Rightful Executor or Administrator.

* The King *versus* Sir Richard Raines. Mich. 12 Will. 3. B. R. * P. 162

MANDAMUS to admit an Executor to prove the Will of his Testator; the Chancellor returned, that true it was, the Party was Executor, but that he was only Executor in Trust for such Children of the deceased, and that he was very Poor, and absconded from his Creditors, by Reason whereof he (the Chancellor) refused to grant Administration, until the Party should give Security to perform the Will, &c. It was urged to maintain this Return, that there are three Sorts of Executors, (*viz.*) there is an *Executor legitimus*, and that is the Ordinary himself; there is an *Executor datus*, and that is where one is appointed by the Ordinary to administer, &c. and he always gives Caution, &c. and there is *Executor Testamentarius*, and that is where one is appointed by the Will of the Testator; and that in this last Case the Ordinary may take Security of him by Caution, as well as they do by Oath. But by *Holt Ch. Just.* where a Man is made Executor, he cannot be sued to Account but only in Respect of Creditors and Legatees, for the Residue is his own by the Common Law; and so it is of an Administrator, because by the Statute 31 Ed. 3. an Administrator is put in the same State and Condition with an Executor; now, an Executor being properly an Officer, 'tis reasonable he should take a Promissory Oath, because this is of Common Right in all Cases of Officers; but 'tis not of Common Right to demand collateral Security of them, and the Ordinary cannot put Terms upon him where the Testator hath put none, neither can he pronounce him to be no Executor, when the Testator hath made him so.

(8)
1 Salk. 299. Mandamus to admit an Executor to prove a Will.

Wankford *versus* Wankford.

THIS Case is reported in 1 Salk. and 'tis much the longest in that Book; but here 'tis only stated, and the Argument of the *Ch. Justice Holt* exactly reported.

(9)
1 Salk. 299. S. C. Where the Obligor makes the Obligor Executor, 'tis a Release of the Debt.

ff. The Obligor married the Daughter of the Obligor, who afterwards made the Obligor Executor, who administered some Part of the Goods, and before he proved the Will he himself made a Will, and his Wife Executrix, and died, after whose Death she proved the Will of her late Husband, the Obligor, and took out Administration to the Obligor cum Testamento annex, and brought an Action against the Heir of the Obligor. The Question * was, whether the Obligor making the Obligor Executor was a Release of the Debt, and he held that it was.

* P. 163

(1.) Because the Obligor is in such Case to pay and receive, and where one and the same Person is to do both those Acts, the Action is released, but the

Executor.

Debt remains as *Assets* in the Hands of the Obligor, and by making him Executor, that amounts to a Payment and Release.

Plowd. 185. b.

(2.) 'Tis otherwise if he had no *Assets*, because then there is no Person to pay, but only to receive, so that 'tis the having *Assets* that amounts to Payment.

8 Rep. 136. Sir John
Needham's Case.

(2.) If the Obligor Administers to the Obligee, though there is *Assets*, this is no Extinguishment, and yet in that Case the same Person is both to pay and receive; the Reason is, because an Administrator comes in by the Act of the Ordinary, but an Executor (as in the principal Case) by the Act of the Party himself; but yet the Chief Justice held, that if an Administrator shall, out of his own Money, pay a Debt of the Intestate to the Value of a Bond Debt, which he (the Administrator) owed to the Intestate, this would be a Discharge of the Bond.

1 Leon. 320. Moor 236.
1 Inst. 264.

(4.) Where the Obligee dies and his Executrix marries the Obligor, this is no Extinguishment of the Debt; but if a Feme Obligee marry the Obligor, this would extinguish the Debt, because it would be a vain Thing for the Husband to pay Money to the Wife in her own Right, but he might pay it to her as Executrix, because there might be *Administration de Bonis non*, of that as well as of other Goods, and it might be kept by itself; and if the Husband takes it, though it becomes his Goods, yet 'tis a *Devastavit*.

Plow. Com. 296. 1 Mod.
213.

(5.) If the Obligee makes the Obligor Executor, and he administers some Part of the Goods (as in the principal Case) and dies before Probate, the Debt is discharged, and this amounts to a Release, because by his administering he hath accepted to be Executor, and becomes a complete Executor, and cannot afterwards refuse or waive it; and he may, before Probate, receive, pay, release and maintain any possessory Action, as *Trover*, or *Trespass* for Goods of his Testator taken since his Death; and he may, before Probate, avow for Rent due since the Death of his Testator, but not before, and the Right of of an Executor is not like that of an Administrator, which is derived from the Ordinary, but 'tis entirely by Virtue of the Will, and the Probate gives him no Right, either to his Office or to an Action, for he may bring an Action before Probate, but an Administrator cannot before Letters of Administration granted; 'tis true, he cannot proceed in such Action before Probate, it being convenient in other respects, but not to give him a Right.

* P. 164

(6.) Where an Executor is made, and he never administers, he may refuse whether he will administer or not; and thereupon * an immediate Administration shall be granted, (*viz.*) *de Bonis W. R. intestati*; but if once he administers, he cannot afterwards refuse or waive the Office, and Administration cannot be committed to another during his Life.

(7.) So likewise if he administers and dies before Probate, an immediate Administration, and not an *Administration de Bonis non* shall be granted, because he died *ante onus super se susceptum* in the Ecclesiastical Court.

(8.) Where an Executor dies after he hath administered and before Probate, and makes a Will, and *W. R.* Executor, such Executor can never be Executor to the first Testator, because he can never prove his Will, for he is not named in the Will of the first Testator, and *no Person can prove his Will but he who is named in the Will*; but if the first Executor had proved the Will, then his Executor would have been Executor to the first Testator, because the Probate of the Will would have been a Continuance of the first Executorship.

(9.) Where several Executors are made, they may all refuse, but if one administers, the rest cannot refuse, but they must all be named in Actions brought in the Right of the Testator, and notwithstanding such Refusal, any of them may release a Debt; and if the refusing Executor survive those who acted, and Administration is committed to another, 'tis void: But if such refusing Executor come into Court and refuse, in such Case Administration may be committed to another.

Upon the whole Matter, the Executor in the principal Case having administered Part of the Goods, though that Executorship was determined by his Death, yet he being once Executor by his administering, that operated as a Release of the Debt; and afterwards he dying before Probate, his Executor cannot be Executor to the first Testator so as to revive this Debt.

Fees, Feuds, and Feoffments.

Yeoman *versus* Bradshaw.

(10)
AD JUDGED, that a *Bill of Exchange* shall be said to be *Bona notabilia* Antea Bills of Exchange 7. where the Debtor is, and not where the *Bill is*, for 'tis no *Specialty* in Law; for if an Executor pays Debts upon simple Contract, or suffers Judgment to pass against him, in such Actions he may plead such Payment or Judgment in Bar to an Action upon a *Bill of Exchange*; 'tis like an Award in Writing, which is no Chattel where such *Award lies*; for in Pleading, 'tis never said *hic in Curia prolat*, which shews that 'tis no *Specialty*.

* Fees, Feuds, and Feoffments.

* P. 165

(1)
FEODAL: Feuds were originally at Will, and then they were called *Munera*, Rel. Spel. 9. afterwards they were for Life, and then they were called *Beneficia*; and for that Reason the Livings of Clergymen are so called at this Day, and afterwards they were made hereditary, and then they were called *Feoda*, and in our Law *Fee-simple*.

(2)
When *Hugh Capet* usurped the Kingdom of *France*, about the Year 947, to fortify and support himself in such Usurpation, he granted to the Nobility, &c. that whereas till then they enjoyed their Honours for Life, or at Will only, they should from thenceforth hold them to them and their Heirs, which was imitated by *William, called the Conqueror*, upon his Accession to the Crown of *England*, for till his Reign *Fees or Feuds* were not *hereditary*, but for Life only, or for some determinate Time.

(3)
A *Feoffment* was originally the Grant of a Feodal Estate or Feud; but now 'tis the Grant of an Estate of Inheritance; and till Feuds and Tenures came in, Charters and Conveyances in Fee-simple were made by these Words *Dedi & concessi*, without the Words *Feoffavi*.

(4)
And until the Statute *Quia emptores terrarum*, the Feoffments were always *tenendum* of the Feoffor *per homagium & servitium*, but after that Statute they were made *tenendum de capitalibus Dominis feodi*, &c.

But now the Way of Pleading a Feoffment is thus, (*viz.* That *W. R.* was seised in Fee of the Place where, &c. and being so seised *feoffavit quendam W. W. inter alia per nomina omnium*, &c. *habend' & tenend' dict' tenementa*, &c. *præfat' W. W. & hæredibus suis in perpetuum ad solum opus & usum*, &c.

Parsons *versus* Pettit.

(5)
A Special Verdict in Ejectment found, that there were two Jointenants in Fee, one of them made Livery within the View, (*viz.*) *Go enter and take* 1 Mod. 91. 2 Lev. 34. 1 Vent. 186. Livery in the *Possession*, but before it was executed she married the Feoffee himself; it was argued, that this Feoffment was void, because there was no actual Entry pursuant to the Livery, and that by the subsequent Marriage the Feoffee was seised in Right of his Wife, and now cannot by his Entry work any Prejudice to her Right; but adjudged that he might enter at any Time, for he had not only an Authority so to do, but an Interest passed by the Livery in View, by which Act the Woman did all which was in her Power to do. * P. 166

Fences.

Fences. See Distress 3.

Pool versus Longvill.

(1)
2 Saund. 289. Where the Plaintiff's Cattle escape into the Defendant's Close for want of repairing the Fences, which the Defendant ought to repair, they cannot be distrained for the Defendant's Rent unless levant and couchant.

* Mod. Cases 198.

* P. 167

(2)
Inquisition for throwing down Fences in the Night-Time.
* Cro Car. 280, 439, 580.
Jones 307. Sid. 107.

IN Replevin, &c. the Defendant avowed the Taking, &c. for Rent arrear; the Plaintiff replied in Bar, that he the Plaintiff was possessed of a Close adjoining to the *Locus in quo*, &c. and that the Defendant, and all those, whose Estate he had Time out of Mind, had made and repaired the Fences, &c. and that the Fences were not repaired, but for Want thereof his (the Plaintiff's) Cattle escaped out of his Close into the *Locus in quo*, &c. and that the Defendant took them before the Plaintiff had any Notice that they were there; and upon Demurrer to this Replication it was adjudged ill, which Judgment was affirmed upon a Writ of Error in B. R. the Court relying upon the Year-Book 10 H. 7. 21. b. where it is held, that if Cattle escape into another Man's Land, and the Lord distrain, 'tis not material whether they were *levant and couchant*, for the Distress is good; but the Reporter tells us, that there is a Difference, where a Lord distrains within his Lordship, and where a Lessor distrains for Rent arrear, for as to the Lord, 'tis not material whether the Fences are in Repair; but as to the Lessor, if he is bound to repair the Fences, he must take Care his Tenant shall do it: *Et per Holt Ch. Just.* 'Tis fit this Case should be better considered, for it will be hard to maintain it.

* The King *versus* the Inhabitants of Penrith. Pasch. 1 Will. 3. B. R.

INQUISITION to the Sheriff to inquire, what Malefactors threw down the Hedges and Fences of *Lancelot Simpson*, &c. and upon a Return thereof a * *Distringas* was awarded; it was objected, that there was not fifteen Days between the *Teste* and Return of the Original, and this was held to be a Fault *per Curiam*: It was also objected, that a *Distringas* ought not be awarded upon the Return of the Inquisition, but a *Scire facias* to shew Cause, &c. but adjudged, that a *Scire facias* was not necessary; then it was objected, that it doth not appear, that *Simpson* was Lord of the Manor, or had a Right to these Fences; but it was held, that need not be shewed, for if he had no Right, that ought to be objected on the other Side. And lastly, it was objected that the *Vill* ought to have a *Year and a Day* to indict the Malefactors, and it appears, that this Inquisition was taken within the Year after the Offence committed: Adjudged, that a Year and a Day is not necessary to be allowed, but a convenient Time, and of that the Court may properly judge.

1 Lev. 106. Rex. v. Inhabitants of Woodford.
Not material whether thrown down by Night or by Day.

Distringas upon the Statute *Westm. 2.* against the Inhabitants of the next Vill, for throwing down Inclosures. Two of the Inhabitants of each Vill appear, and plead, that the Inclosures were thrown down in the Day-Time, and not in the Night. *Et per Curiam*, Whether they were thrown down in the Day or Night 'tis not material, for if the Offenders were nor known 'tis within the Statute, which gives the Remedy where the Offenders are not known, and where they are known, the Party hath Remedy by an Action of Trespass.

* P. 168

*** Fines.**

Anonymous. Hill. 12 Will. 3. B. R.

(1)

PER *Holt Ch. Just.* at Common Law Fines were levied upon any Original Writ; as upon a *Writ of Entry*, *Writ of Right*, &c. as well as upon a *Writ of Covenant*, and they might be levied for any Thing for which a *Præcipe quod reddat* or *permittat* lies; and they are leviable in *Counties Palatine* by the Statute 38 H. 8. cap. 19. and 2 and 3 Ed. 6. cap. 28.

Clements

Forcible Entry.

Clements *versus* Langham Pasch. 2 Annæ.

ERROR of a Fine levied in the Court of *Common Pleas*; the Error assigned was, that the Cognisor *died* after the Caption, and before the Return of the Writ of Covenant, and for this Reason it was reversed. *Sed, &c.*

(2)

Where the Cognisor died after the Caption, and before the Return of the Writ of Covenant.

The Husband prevailed with his Wife, being about twenty Years of Age, to levy a Fine of her Inheritance; the Wife *died*. * *Et per Curiam*, if she had been living and under Age, she might upon a Motion be brought into Court by an *Habeas Corpus*, and if by Inspection she be found to be under Age, the Court will set aside the Fine, and punish the Commissioners, who took the Caption; but at Common Law, there were no such Abuses, because all Fines were levied in Court; but now since the Statute 15 *Ed.* 2. which gives the *Dedimus*, Fines have often been levied by Infants.

(3)

Fine levied by an Infant, who died before she was of Age.
2 Vent. 30. 3 Lev. 36.

A Fine of all his Lands in the *Parish of Blandford*, shall pass all his Lands in that Parish, though in several *Vills*, but not out of the *Vills*, though in the Parish, &c.

(4)

1 Vent. 143, 170.

A Fine and Nonclaim bars all Trusts and Equities, where the Equity charges the Land, but where it charges the Person in Respect of the Land, it will not bar; also an Equity of Trust, created by a Fine, shall never be destroyed or barred by the same Fine.

(5)

1 Ch. Rep. 278.

* Forcible Entry.

* P. 169

The Queen *versus* Griffith & al' Mich. 1 Annæ. B. R.

INDICTMENT for a Forcible Entry quashed, for not setting forth, that the Party was *seised or disseised*, or what Estate he had in the Tenement; for if he had only a Term for Years, then the Entry must be laid *into the Freehold of A. in the Possession of W. R.* and the Restitution must be accordingly: The Word *Seisin* is a Term of Art in this Case, it being upon the Statute of H. 6. but the Case in * *Popham* was upon the Statute † 21 *Jac.*

(1)

Indictment quashed for not setting forth, that he was seised or disseised.

* Poph. 205.
† 21 Jac. cap. 15.

Anonymous.

AT Common Law, where the Party had a Right he might enter with Force; but by the Statute 15 *R.* 2. he is restrained from entering with Force, though he hath a Right to enter; neither can he enter peaceably, and hold out *manu forti per* 8 *H.* 6. cap. 5. nor enter *manu forti*, and hold out *manu forti*.

(2)

Now in these Cases, a Man may either proceed Civilly or Criminally; his civil Remedy is by Writ of Forcible Entry, wherein he shall recover treble Damages and Costs; and this is upon the Statute of H. 6. and to this Writ the Defendant may plead Not guilty, or he may plead any Special Matter, and traverse the Force; and the Plaintiff in his Replication must answer the Special Matter, and not the Traverse, for there shall be no Inquiry of the Force, if the Special Matter is found for the Defendant, and if 'tis found against him, then he is convicted of the Force of Course.

But the Plaintiff can never recover in this Action, unless he maintain his Writ (*viz.*) that the Defendant *expulit & disseisavit eum*; therefore he must have some Estate of *Freehold* at least, and such an Estate upon which the Defendant could not lawfully enter, otherwise it can be no *Disseisin*.

(3)

* But if *W. R.* is seised, and *L. R.* having good Right to enter, doth accordingly enter *manu forti*, he might be indicted notwithstanding his Right, and Restitution shall be awarded.

* P. 170

(4)

Forgery.

The King *versus* Bengough. Trin. 11 Will. 3.

(5)
Upon an Inquisition taken upon the View by one Justice, he cannot deny a Traverse of the four.

* Dyer 122, 359, 360.

INQUISITION for a Forcible Entry upon the Possession of *Lanton*, was taken upon *View* by one Justice of Peace, and Restitution awarded; and now the Attorney-General moved for Re-restitution upon an *Affidavit* made, that when the Force was found, the Defendant tendered a *Traverse* of Not guilty to the Inquisition, which the Justice of Peace refused to accept; and *per Curiam* (except *Gould* Justice) the Justice of Peace should have accepted the *Traverse*, for the Fact was traversable, and that the Law was taken to be so in this Court during all the Time the *Ch. Justice Keeling* sat here: 'Tis true, in * *Styles* 'tis said, that upon an Indictment at Sessions, the Justices may accept a *Traverse*, but that a Justice of Peace, upon an Inquisition of a Force taken upon his View, cannot accept a *Traverse*, because 'tis a Sort of Judgment upon his View; but the Law is taken to be otherwise.

(6)
1 Vent. 108.

The Indictment was, that *W. R.* being *seised and possessed, &c.* the Defendant entered; this was adjudged ill for the Uncertainty.

(7)
1 Vent. 306.

So 'tis where the Indictment was, that *W. W.* entered and *disseised him*; for though a *Disseisin* may imply a *Freehold*, yet it ought to be expressed.

(8)
1 Roll. Rep. 406.

Indictment, &c. reciting the Statute 8 H. 6. to be (*viz.*) If any one be expelled *vel disseised*, this was adjudged ill; for the Statute is *si aliquis expulsus & disseisus* in the *Copulative* and not in the *Disjunctive*, so the Person must be both expelled and disseised.

* P. 171

* Forgery.

The Queen *versus* Goddard & al'. Trin. 2 Annæ. 2 Ld. Raym. 920.
S. C.

(1)
1 Salk. 342. Indictment for Forgery not good.

* Postea Indictment 6.

THERE is a short Note of this Case in 1 *Salk.* but the Case was as followeth: *ff.* It was an Indictment for forging an Assignment of a Lease, the Indictment was, (*viz.*) *Juratores, &c. super sacramentum suum presentant quod cum Testatum existit per quandam Indenturam quod W. R. dimisisset & concessisset & per eandem indenturam dimisit & concessit, &c.* The Defendant *falso fabricavit quandam assignationem sive scriptum vel indorsementum in scriptis, tenor cujus quidem assignationis sequitur*, and then it sets forth the Assignment, *in hæc verba*; and at the Bottom there was the *Mark of the Assignor*, for he could not write his Name; but no Mark appeared upon the *Postea*: *Et per Curiam*, the * *Quod cum* is well enough, for 'tis but an Inducement to the Fact; and when the Indictment comes to charge the Forgery, it charges it in a particular Manner; 'tis true 'tis otherwise in an Action of Trespas, for there *Quod cum* is only Recital and no positive Charge: *Et per Holt* and *Powis*, the Words *per eandem Indenturam concessit* were a positive Averment of a Lease, and had no Relation to the *Testatum existit*, but *Powell* and *Gould contra*: And *per totam Curiam*, the Want of the *Mark* of the Defendant upon the *Postea* was a fatal Defect, for by the Statute of Frauds, &c. a Lease is not assignable without a Writing signed by the Party: But *per Holt* Ch. Just. If the Indictment had been for *forging a Deed of Assignment*, and the Fact had been set forth without any Mark or Signing, that might have been good, because *Signing* is not necessary to a Deed, for in former Times they were only sealed and not signed; but now, since the Statute of Frauds, &c. an Assignment by Writing, if 'tis no Deed, yet it must be signed, and this being no more, it ought to have been signed, otherwise 'tis no Assignment: And now the Court being informed, that there was a new Indictment found against the Defendant, they would not give Judgment upon these Exceptions, but ruled the Defendant should plead to the *Signing*: And *per Holt* Ch. Just. the Defendant cannot plead over

Foreign Plea.

over in any Case but in Treason and Felony, and being found * guilty, he could * P. 172
not plead the other Indictment pending in Abatement, but must plead *auterfoits*
convict.

The Queen *versus* Brown.

INDICTMENT for forging a Cocquet *pro quinq; Sarcinis lini, Anglice*, Mod. Cases 87. (2) Indict-
five Packs of Linen Cloth; and being found guilty, it was moved in Arrest ment for Forgery not
of Judgment, that the Indictment was ill, because it was uncertain how much quashed.
Cloth there was in those Packs; but adjudged, that 'tis sufficient to describe
the Thing in which 'tis contained; As for Instance, * *Duas Sarcinas Canapis, An-* * 1 Lev. 303. 2 Lev.
glice, two Bundles of Hemp. 125.

The King *versus* Marsh.

ON E *Marsh* was found guilty of *Murder* upon the Coroner's Inquest, and Information for Forgery (3)
afterwards the Coroner inserted the Names of two other Persons as found compounded.
guilty by the same Inquest, who, together with the said *Marsh*, were indicted
upon the said Inquest, which being tried at Bar, they were all acquitted; after-
wards two of the Jury of the Coroner's Inquest made Oath, that they found the
Indictment only against *Marsh*, and that the Coroner took the Indictment, it
being in *English*, and told them he must ingross it in *Latin*, which was done,
and then he inserted the Names of the other two Persons, whereupon an Infor-
mation was brought against him for a Forgery, which was tried at Bar, and he
was found guilty, but having compounded with the Prosecutor, was fined only
twenty Nobles.

Watts's Case.

INFORMATION against the Defendant for Forgery, and for pub- (4)
lishing a forged Deed, knowing it to be forged: adjudged, upon a Confer- Hardres 331. Who shall
ence with the Judges of B. R. to whom one of the Barons of the Exchequer not be a Witness to an
was sent, that no Person who is or may be a Loser by the Deed, or who may Information for a For-
receive any Benefit or Advantage by the Verdict being found against the Defen- gery.
dant, shall be a Witness.

* Foreign Plea.

* P. 173

Cholmly *versus* Broom. Pasch. 9 Will. 3. B. R.

DE B T against the Defendant *in Custodia Marefcalli*, upon a Bond sealed 5 Mod. 335.
and delivered at *Chester*: The Defendant pleaded, that he was an inhabi-
tant in *Chester*, and at the Time of the Action brought lived in *Chester*, &c.
The Plaintiff taking this to be a Foreign Plea, and therefore ought to be sworn,
which not being done, he entered Judgment: But it was set aside, for *per Curiam*,
a Plea to the Jurisdiction is no *Foreign Plea*, nor a Plea of *Privilege*, nor of
Ancient Demesne, which Pleas are never sworn: A Foreign Plea is where the De-
fendant by his Plea would remove the Cause of Action out of the County where
the Plaintiff had laid it; but 'tis no Foreign Plea where the Defendant agrees the
Place and County, as the Plaintiff had laid it.

Sparks *versus* Wood.

IN an Action of Debt in *London*, the Defendant moved for a Prohibition, Mod. Cases 146. In
suggesting, that he tendered a Plea in the inferior Court, that the Cause of what Court Oath ought
Action did not arise within the Jurisdiction of that Court, and offered to make to be made.
Oath of it, and now would have made *Affidavit* of the Truth of the Fact, and
of his Plea in B. R. *Sed per Curiam*, Oath ought to be made of the Truth of
the

Fraud and Covin. Gaming.

the Plea in that very Court whose Jurisdiction is denied; and it appearing that he tendered such Oath after the Court was up, this Prohibition was denied, for it ought to be done *sedente Curia*, and *in propria persona*.

* P. 174

* Fraud and Covin.

(1)

BY the Statute 13 *Eliz. cap. 3.* all fraudulent Conveyances as to Creditors are made void, and by the Statute 27 *Eliz. cap. 4.* they are made void as to Purchasers.

(2)

Now upon the first of these Statutes, if a Man gives his Goods to his Son, yet they are still liable as to his Creditors; but if he gives them to one of his Creditors *Bona fide*, without any Trust or Covin, they shall not be liable to other Creditors.

(3)

So if a Man is *indicted* and gives away his Goods to prevent a Forfeiture, the King shall have them upon an Attainder or Conviction; otherwise if he sell them to one for a valuable Consideration, who had no Notice of the *Indictment*.

(4)

Vent. 257.

If Tenant for Life commit a Forfeiture, so that by the Entry of him in the Reversion his Creditors may be defeated, this is a fraudulent Conveyance as to them.

(5)

Sid. 133.

Upon the Statute 27 *Eliz.* if a Man levy a Fine to the Use of himself for Life, Remainder to his Son in Tail, and afterwards sells the Fee-simple to *W. R.* he, as a Purchaser, shall avoid this Conveyance, because it was *voluntary*, and therefore fraudulent; so it had been if he had settled the Remainder on his Wife, unless there had been a Consideration or precedent Marriage.

(6)

The Father made a Lease for twenty-one Years, in Trust for his Daughter till Marriage; and if she married with his Consent, then to her during the Term, this till Marriage is fraudulent as to a Purchaser, but after Marriage 'tis good, because Marriage is an Advancement to the Daughter, and the Husband was drawn in by this Conveyance to marry her.

(7)

2 Lev. 148.

The Husband was a Tradesman, and his Wife was an inheritrix, and he promised her, that if she would join with him in a Sale of her Land, and let him have the Money to pay his Debts, that he would leave her 400 *l.* about six Months after the Lands were sold, he gave Bond to *W. R.* to leave his Wife 400 *l.* adjudged, this is not fraudulent, but good against Creditors.

* P. 175

* Gaming.

(1)

Mod. Cases 128. *Indebitatus Assumpsit* will not lie upon mutual Promises.

Smith *versus* Ary. Hill. 2 Annæ. 2 Ld. Raym. 1034. S. C.

* 2 Vent. 175. 3 Lev. 118. contra. 5 Mod. 13. 1 Lutw. Whityear v. Chancy. Moor 776.

INDEBITATUS *Assumpsit*, in which the Plaintiff declared, that in Consideration he had promised the Defendant to play and to pay what he lost; the Defendant promised to play, and to pay the Plaintiff what he (the Defendant) lost; *Cumq; etiam*, that he (the Plaintiff) had won so much Money *ad Ludum prædictum*, the Defendant *in Consideratione inde* promised to pay it: The Court agreed, that here were mutual Promises laid in the first Count, but that an ** Indebitatus* would not lie upon those Promises; 'tis true, it was insisted for the Plaintiff, that the mutual Promises in the first Count must be understood, as if repeated in the second, because the Play was upon the same Agreement, and the Money was alledged to be won *ad Ludum prædictum*. But *per Curiam*, the second Count is not the better for the first, for they are separate and distinct from one another,

Guardian.

another, so that the Agreement laid in the one will not go to the other; and if so, then there is nothing to support this Action but the mutual Promises, and Debt will not lie upon a Promise, and consequently an *Indebitatus* will not; for there must be a Consideration, or a *Quod pro quo* to support it.

Rostington's Case. 1 Ld Raym. 89. S. C. cited by the Name Rostindale.

ONE covenanted, that his Horse should run four Heats with the Horse of W. R. for 30 l. each Heat, which in all amounts to 120 l. Adjudged, that though he win every Heat, he can recover no Part of the Money, for though they were distinct Wagers, yet the Contract was entire. (2) 1 Vent. 253. 2 Lev. 92. Though the Wagers are distinct, the Contract is entire.

Eggleton versus Lewin.

INDEBITATUS Assumpsit for 20 l. won at Cards, there was Judgment by Default, and a Writ of Inquiry executed, &c. and upon a Writ of Error in the Exchequer Chamber; the Error assigned * was, that a General *Indebitatus Assumpsit* would not lie for Money won at Play, and the greater Number of the Judges inclined, that it would; But per Holt Ch. Just. and Pollexfen, Ch. Justice of C. B. that it would not, because there must be some meritorious Act, as a Consideration to maintain such Action; it will lie against him who holds the Wager, because the Law implies a Promise, to deliver the Money to the Winner. (3) *Indebitatus Assumpsit* lies for Money won at Play, &c. * P. 176

Guardian.

A Guardian is either *legitimus, testamentarius, datus, or custumarius*. (1)

He who is a *lawful Guardian* is so either *jure communi*, or *jure naturali*; the first as Guardian in Chivalry, who is so either in Fact or in Right, the other *de jure naturali*, as Father or Mother. (2)

A *Testamentary Guardian* by Common Law; for the Body of the Pupil was to remain with him who was appointed by the Testator, till the Age of 14, but as for his Goods it might be longer, or as long as the Testator appointed; and as to this Matter there are several * Statutes, which you may see in the Margin. (3)

Guardianus datus, by the Father in his Life time, or by Lord Chancellor after the Death of the Father. * 32 H. 8. 34 H. 8. 4 & 5 Ph. & Mar. 12 Car. 2. (4)

And lastly, there is a Guardian by Custom, as of Orphans by the Custom of London, and other Cities and Boroughs. (5)

By the Civil Law, *Id quod a tutoribus arrogatur potius justitia quam aliena auctoritate firmatur*, therefore the Guardian is to educate his Pupil *pro facultate patrimonii & dignitate natalium*; and this Word Education comprehends Food, Raiment, Lodging, Physick and Schooling. (6)

He shall answer for what is lost by his *Fraud, Fault, Negligence* or *Omission*, but not for any casual Events, as where a Thing had been well but for such an Accident. (7) * P. 177

He ought to sell all Moveables in a reasonable Time, and turn them into Land or Money, especially if they were *bona peritura*, for those yield no Profit; yet in some Cases this Rule may fail, as where the Pupil is near being of Age, and may want such Goods. (8)

Heir.

(9)

He shall pay *Interest for Money* in his Hands, which he might have put out at Interest, for in such case he shall be presumed to make Use of it himself.

(10)

If 600*l.* is due and in Arrear from the Infant's Estate, and the Guardian compounds it for 100*l.* the Infant shall have the Benefit of such Composition, and not the Guardian.

(11)

Where a Father devises his Child to a Guardian the Chancery cannot interpose. 2 Ch. Rep. 237.

Now as to *Guardianus datus*, this Case happened; the Father devised the Tutition of his Son, being *seven Years of Age*, to his Mother in Law, and died; afterwards the Widow married her Servant, and being Poor, the Uncle gets the Possession of the Infant, and sends him beyond Sea, but the *Lord Chancellor* ordered him to send for and restore the Infant; for where there is a Guardianship by the Common Law, this Court can order and intermeddle, but where by Statute, as in this Case, the Court cannot remove either the Child or Guardian; but we can and will make him give Security not to marry the Infant without the Court is first acquainted with it.

(12)

Hutt. 16. Hob. 215. Lutw. 1188.

And as to a *Guardian by Custom*, as in Copyhold Manors; if the Copyholder has a Son within Age, and die, the Guardianship doth *de jure* belong to the next of Kin, to whom the Lands cannot descend; but by Custom it may belong to the *Lord of the Manor*, either to be *Guardian* himself, or to appoint one.

(13)

3 Lev. 395. 2 Lutw. 1182. * Cap. 24.

The Father in a Copyhold Manor, and being a Copyholder himself, cannot by Virtue of the Statute * 22 Car. 2. appoint a Guardian for his Son, for there may be a Custom to the contrary, and to alter that Custom may be prejudicial to the Lord of the Manor.

(14)

2 Lev. 162.

* P. 178

Where an *Infant* has only a *Personal Estate*, the Ecclesiastical Court may appoint a Curator or Guardian as to that, and may take Security of such Curator by Bond, for due Performance of his Trust; but it hath been a Question, whether such Bond should be taken in the Name of the Ordinary and Commissary, or in the Name of the Ordinary only.

Bridget Hide's Case.

(15)

2 Lev. 128. An Infant being in the Custody of her Father in Law, the Court ordered him to enter into a Recognizance not to suffer her to marry, &c.

B R I D G E T Hide, being the Daughter and Heir of Sir *Thomas Hide*, and about thirteen Years old, and her Mother having married Sir *Robert Viner*, and she being dead, the Court was moved for a *Habeas Corpus* to be directed to Sir *Robert Viner*, in whose Custody she was left, and who had no Right to her, so that her Aunt was Guardian at Law; and she being brought into Court, it was suggested, that he intended to marry her to a great Person, but of small Fortune, though she was already married to one Mr. *Emmerton*, by the Consent of her Mother whilst living, which Marriage being questioned, and the young Child being asked by the Court, whether she was willing to stay with her Father-in-Law? she answered, that she was; whereupon he was ordered to enter into a Recognizance of 40,000*l.* not to let her marry whilst she was in his Custody, and to permit her Aunt to visit her.

Heir.

Killow *versus* Rowden. Hill. 2 Will. 3. B. R.

(1)

2 Lev. 286. 3 Mod. 253. Debt brought against an Heir, without shewing how Heir, good.

D E B T against the Defendant as Heir as to his Father, without shewing how he was Heir; upon *Riens per Descent* pleaded, the Jury find, that *John Rowden*, the Father, being seised in Fee, entered into this Bond for which the Suit was now brought, and afterwards he settled his Lands to the Use

Heir.

Use of himself for Life, Remainder to his *eldest Son in Tail*, Remainder to his own Right Heirs, and died; after whose Death the eldest Son entered and died, leaving Issue a Son, who also died without Issue, so that the Reversion (after the Estate-tail * being spent) came to the second Son of the Obligor, who was now Defendant; and the Question was, whether he had the Estate by *immediate Descent* from him, or from his Nephew, who was the only Son of his elder Brother: *Et per Curiam*, neither the elder Brother or his Son, were ever seised of the Reversion, for they were seised of an Estate-tail, and not of the Reversion expectant upon the Determination of that Estate, and if a *Formedon* had been brought against the Defendant he should not in making his Title have mentioned either his + elder Brother or Nephew; and yet they were seised of the Reversion to some Purposes, (*viz.*) *to give, to forfeit, to be in Ward*, and to join the *Mise* upon the mere Right.

* P. 179

+ 1 Inst. 14. b. Dyer
308. b. 1 Cro. 412.

In Debt against the Heir upon the Bond of his Ancestor, he cannot plead that *W. R.* is Executor, and hath Assets sufficient to pay the Debt, because the Plaintiff ought to have the Benefit of his Security, and by Consequence his Election to charge either Heir or Executor; but in such Case the Heir by a Bill in Equity against the Executor shall be relieved.

(2)
3 Lev. 189. Hard. 515.
Where an Heir shall be
relieved against an Execu-
tor in respect of Assets.

Adjudged, that the Heir is never bound without an *express Lien and Assets*, and even then no longer than he hath *Assets*, for he is not bound to keep them till he is charged; but if he hath *Assets* he ought to plead truly and to confess them, otherwise a Judgment general shall be given against him *de terris propriis*, for 'tis now his Debt.

(3)
Jones 88. Heir bound no
longer than he hath
Assets.

Redshaw versus Hesther.

DE B T against the Defendant as Heir upon a Bond of his Ancestor; upon *Riens per Descent* pleaded, the Plaintiff replied, that he had Lands by Descent *ante exhibitionem Bille*, *unde de debito prædicti satisfecisse potuit*, & *petit judicium Curie*; and upon a Demurrer to this Replication it was objected, that the Plaintiff ought to have concluded to the Country; besides, the Replication is ill at Common Law, because 'tis, that the Defendant had Lands by Descent *ante exhibitionem Bille*, which may be true, and yet he might have none at the Time of the Bill exhibited; 'tis likewise ill by the * Statute, for that directs, that *where the Heir sells any Lands which were liable to the Debts of his Ancestor, before any Action brought against the Heir, he shall be answerable for the Value of the Land so sold*, which Value should be tried by a Jury, who, upon finding that such Lands descended, are *ex Officio* to inquire of the Value; therefore the Replication should be, that the Defendant had Lands by Descent, before, or at the Time of the original * Writ, &c. without alledging *unde de debito satisfecisse potuit*, and then concluding *unde petit judicium*, &c. because 'tis making the Value Part of his Replication, and putting it upon the Judgment of the Court, when it ought to have been tried by a Jury: *Sed per Curiam*, the Replication is good, for though a Jury may find, that what descended to the Heir is not sufficient to satisfy the Debt, and so may falsify the Value alledged in the Replication, yet the Plaintiff shall recover to the Value of the Land sold be it what it will.

(4)
5 Mod. 122. Debt a-
gainst an Heir, good.

* 3 & 4 Will. 3.

* P. 180

Osbaston versus Stanhope.

DE B T against an Heir upon a Bond of his Ancestor; the Defendant pleaded, that he had nothing by Descent *præter* the Reversion expectant after the Determination of a Lease for Years; the Plaintiff replied, that he (the Defendant) had sufficient Assets by Descent; and upon a Demurrer it was objected, that this general Replication was ill, for that the Plaintiff ought to have answered the *Præter*: *Sed per Curiam*, the *Præter* is immaterial, because the Reversion which follows is not chargeable, for the Ancestor had settled the Lands upon Trustees to the Use of himself for Life, Remainder to the *Heirs Males of his Body*, Remainder to his own right Heirs, with Power for the Trustees to make Leases, so that this was a Lease made by them, and if the Reversion should

(5)
2 Mod. 50. Debt against
an Heir, who pleaded,
that he had nothing by
Descent præter Reversio-
nem, not good.

Heriot. Highways.

should happen before the Estate-tail spent, he had still but a Reversion after an Estate-tail.

* P. 181

* Heriot. See Suit of Court, 3.

Smartle *versus* Penhallow. Hill. 1701. B. R. 2 Ld. Raym. 994. S. C.

(1)
Mod. Cases 63. 1 Salk.
188. Custom, that a
Copyholder might sur-
render for three Lives suc-
cessive, and that an Heriot
was due upon the Death
of every Tenant.

IN a Special Verdict in Ejectment, the Case was, the Custom of a Manor was, that a Copyholder might surrender for three Lives *successive*, and that an Heriot was due on the Death of every Tenant; a Copyholder surrendered to W. R. for his own Life, and for the Lives of A. B. and C. D. and the Question was, whether this was warranted by the Custom, and adjudged that it was, and that it was no Inconvenience to the Lord of the Manor, for there could be no Occupancy: but Powell Justice doubted, because of the Statute of Bankrupts: *Sed per Holt* Ch. Just. The Statute makes no Difference, for if the Copyholder becomes Bankrupt, and his Estate is assigned by the Commissioners, the Assignee would have it determinable upon the Life of the Copyholder Bankrupt, and that the Heriot would be then due, but not upon the Death of the Assignee, because it was so originally, and cannot be altered by the Act of the Copyholder himself.

Osborne *versus* Sture.

(2)
2 Lev. 2 Lutw. 1366.
3 Mod. 230. Heriot-Ser-
vice, where to be paid.

IN Trespass the Case was, a Lease was made to Dorothy Edgcomb for ninety-nine Years, if she and Margery Upton should so long live, under yearly Rent of 20 s. and also after the Decease of the said Dorothy and Margery, her or their best Beast in the Name of an Heriot, that the Plaintiff Osborne married Dorothy Edgcomb, and in Right of his Wife was possessed, and that she and the said Margery Upton were dead, and that the Defendant took the Gelding for an Heriot after the Death of Margery, &c. and upon a Special Demurrer it was objected, that an Heriot ought not to be paid, for this being an Heriot-Service reserved on a Lease, is of the same Nature with all other Services reserved on Leases, and that is to be paid * whilst the Lease is in Being, but here it was determined by the Death of Margery, and there was no Reversion in the Defendant at that Time; two Judges were of that Opinion, but two more held, that the Defendant had a reversionary Interest in that Instant of Time that Margery died, and that the Seising the Gelding shall relate to that Time.

* P. 182

Highways.

See Dr. Burn's Justice Title Highways, all the Learning on this Subject.

(1)
What is a Highway and
what a private Way.

ADJUDGED, that where a Way leads to a Market-Town, or communicates with a great Road, 'tis a Highway, but if it leads to a Church, or to a Vill, or to a particular House, 'tis a private Way, and in a Highway, which is called *Via Regia*, the King hath only the Passage for himself and the People; for the Freehold of the Soil is in the Lord of the Manor, or in the Owner of the Land on each Side, and if there are Trees and other Profits there, they belong to him.

(2)
Who are to repair High-
ways and private Ways.

Now, as to Reparation of each, a private Way is to be repaired of common Right by that Vill or Hamlet where it lies, but a Publick Highway is to be repaired by the whole Parish, unless some private Person is bound to do it, either by Prescription, Tenure, or Encroachment.

2

But

Hue and Cry.

But *Lessee for Years* cannot be charged *ratione tenuræ*, because that goes with the Inheritance. (3)
Lessee for Years cannot be charged *ratione tenuræ*.

Where a *Highway* lies over an open Field, and the Owner of the Field turns the Way to another Part of the Field for his own Convenience, or incloses the Field for his own Benefit, and leaves a sufficient Way besides, he is bound to repair and maintain that Way at his own Charge, and he must make it passable, though it was foundrous before; and if the Way is not sufficient any Passenger may break down the Inclosure and go over the Land, and justify it till a sufficient Way is made, and in this Case the Jury are only to inquire if it is the ancient Way, if it is inclosed for the Profit of the Owner of the Soil, and if it is foundrous; and it being proved, that it was impossible to make the Way, because of the Soil: *Per Curiam, Lex neminem cogit ad impossibilia*, but in this Case the Defendant * had bound himself to make the Way good by inclosing the Field, and that if he would take away the Inclosure, the Charge would fall upon the Parish. *Et per Curiam*, though he hath made the Way as good as 'tis capable of being made, he shall not give that in Evidence in Discharge of the Information, but he may give it in Evidence, in Mitigation of the Fine. (4)
Cro. Car. 306. Where a Highway is turned to another Place, he who turns it must keep it in good Repair.
* P. 183

Information against a *Common Carrier*, setting forth, that no *Waggon* ought to carry more than 2000 Weight, and that the Defendant used a *Waggon* with four Wheels, & *cum inusitato numero Equorum*, in which he carried 3000 or 4000 Weight at one Time, by which he spoiled the Highway, leading from *Oxford* to *London* (*viz. at Lobb-Lane, in the Parish of Hosely*; this was adjudged good, though it was laid generally at *Lobb-Lane*, without shewing how many *Perches* in Length, because the Nuisance was alledged, for all the Way leading from *Oxford* to *London*, and *Lobb-Lane* was mentioned only for the *Venue*; and though there was no particular Measure expressed how much of the Way was spoiled, it shall be intended all *Lobb-Lane* was spoiled; likewise, though 'tis said, that he went *inusitato numero Equorum*, without setting forth what Number, yet the Information is good, because it was the excessive Weight which he carried that made the Nuisance. (5)
Mich. 17 Car. Egerly's Case. Information against a Common Carrier, for overloading his Waggon.

The Defendant was indicted for stopping the *King's Highway* in *Kensington*, without setting forth any Boundaries or Abuttals in the Way, leading from such a Town to such a Town, yet adjudged good, for a Highway shall be intended to go throughout the Kingdom; but 'tis otherwise, if the Indictment had been for stopping a *private Way*. (6)
Noy 90. Latch. 182.
2 Leon. pl. 13. Indictment for stopping a Highway, good.

Upon an Indictment for Stopping a *Highway*, the Course of the Court is, that the Defendant may be admitted to a Fine upon his Submission, and a Certificate of repairing either before or after Verdict; but if after Verdict, there must be a *constat* to the Sheriff, that he may return that the Way is repaired, for the Verdict being a Record of Conviction must be answered by Matter of Record. (7)
Raym. 215. The Defendant may be admitted to a Fine after a Verdict on a Certificate that the Way is repaired.

Indictment against a Parish, for not repairing a *Highway*; upon Not guilty pleaded, they cannot give in Evidence, that another is bound to repair, for if that be the Case, it must be pleaded; but where a private Person is indicted for not repairing, he may give in Evidence, that another is to repair, because he is not bound of Common Right, as the Parish is. (8)
1 Vent. 256. The Defendant cannot give in Evidence, that another Parish is bound to repair for it must be pleaded.

* Hue and Cry.

* P. 184

See Dr. Burn's Justice, Title Hue and Cry, all the Learning on this Subject.

BEFORE the Statute of *Winton*, the King had a certain Farm or Rent out of each County in *England*, for keeping *Watch and Ward*, and by that Statute the Counties were discharged of this Rent, being enjoined to do it themselves.

VOL. III.

7 N

The

(1)

Ideot. Imparlance.

(2)
Noy 155. Where Notice
is to be given of the Rob-
bery.

The Person robbed ought to give convenient Notice thereof, as soon as he can; and being robbed in the Hundred of *A.* and not knowing the Confines of that Hundred, he goes into the next Hundred and gives Notice there, 'tis sufficient, for that Hundred ought to make Hue and Cry, and by that Means the other Hundred of *A.* will know of the Robbery.

(3)
The Purchaser of the
Lands is liable to the
Charges after a Robbery
done.

If after a Robbery a Hundredor sells his Lands, the Purchaser or Lessee is liable, for 'tis a Charge upon the Land itself.

(4)
The Person robbed is not
bound to pursue Robbers.

The Party robbed is not bound to pursue the Robbers himself, or to lend his Horse for that Purpose; and if he knows any of the Robbers he must enter into a Recognisance to prosecute; but still he has Remedy against the Hundred, if they are not taken.

(5)
Sid. 11. Where the Hun-
dred is discharged.

And if any of them are taken within forty Days after the Robbery, or if they take them before the Plaintiff recovers, the Hundred is discharged.

(6)
Of the Oath to be made of
the Robbery.

The Party robbed must make Oath before a Justice of Peace, that he did not know the Robbers, or any of them; this he is enjoined to do by the Statute 27 *Eliz. cap. 13.* Therefore where an Action was brought on the Statute of Hue and Cry, and upon Not guilty pleaded, the Plaintiff had a Verdict; it was objected in Arrest of Judgment, that no Time was laid of the Examination before a Justice of Peace within twenty Days before the Action brought, which is traversable.

* P. 185

* Ideot. See Remainder.

Imparlance.

The Queen *versus* Rawlins. Mich. 4 Annæ, B. R.

Mod. Cafes 243. 1 Salk.
367. Imparlance given to
another Term.

AN Information was filed against *Rawlins* on the first Day of *Michaelmas* Term, on which Day he was bound by Recognisance to appear, and accordingly did appear and prayed an *Imparlance*. And per *Northey Attorney-General*, formerly, when the Defendant came in by *Habeas Corpus*, or upon his *Recognisance*, he was to plead *instante*, that if a Declaration in a Civil Action is delivered the first Day of *Michaelmas* Term, or at any Time before *Craftin' Animarum*, though the Defendant is not bound to plead so as to try the Cause that Term, yet he shall plead so as to enter, and that the Defendants ought not to have greater Indulgence on the Crown-side; therefore in this Case he insisted, that the Defendant should imparl only to *Craft. Animarum* of that Term. Et per *Holt Ch. Just.* Imparlances may be to a Day certain, or to a Return-Day of the same Term, or from one Term to another; and that it was reasonable in this Case to give the Defendant Leave to imparl not to a Day in the same Term, but to a Day of another Term, because, if a Summons had issued, and Process had been continued, he might have stood out to another Term, but might have been brought in before the End of that Term, and then he must have pleaded *Instante*, and so he shall do now in another Term.

* P. 186

* *Ellis versus Thomas.* Hill. 9 Will. 3. 1 *Ld. Raym.* 285. S. C.

Where an Imparlance is
to be allowed, where not.

IMPARLANCEs are allowed in General Actions of Trespass, but not in a Special *Clausum fregit.* Et per *Holt Ch. Just.* If it appears upon the Record, that an Imparlance was due and denied, 'tis Error; but then such Error must appear on the Record.

No

Indictment.

No Imparlance is allowed in a *Homine Replegiando*, or in *Affize*, because 'tis *feſſimum Remedium*, unleſs upon good Cauſe ſhewn.

Indictment: See Reſtitution, 3.

The King *verſus* Knight. 1 *Ld. Raym.* 527. S. C.

THE Defendant was indicted, for that he being *nuper receptor*, &c. did falſely ⁽¹⁾ tenderſe twenty Exchequer Bills *Quaſi receptæ eſſent pro Cuſtumis*, &c. in *Salk.* 375. Where the Charges is not direct. *deceptionem*, &c. The Judgment was arreſted, for that *nuper receptor* doth not import, that he was the King's Receiver; then to ſay *falſo indorſavit quaſi receptæ eſſent*, is no direct Charge of any Thing which is criminal; 'tis true, 'tis ſaid in *deceptionem Domini Regis*, but that is only Matter of Inference and Concluſion, whereas the Charge continued in every Indictment ought to be ſo certain, that the Defendant may know what answer to make, and that the Court may ſet the Fine in Proportion to the Offence; and likewise, that if the Defendant ſhould be indicted again for the ſame Fact, he may plead *Auterſoits convict*; 'tis true, the Jury have found, that the Defendant *falſo indorſavit*, but that will not fix a Guilt, for they are only to find the Contents of the Indictment; and if that will not amount to a Crime, the Adverb, *falſo*, will not make it ſo.

* Anonymous. Trin. 2 Annæ.

* P. 187

THE Defendant was indicted *Quare vi & armis centum oves*, &c. cepit, and ⁽²⁾ and a Motion was made to quaſh it, for that it was no more than an Indictment for taking Action of Treſpaſs: But *per Curiam*, an Indictment will lie for taking Goods forcibly, but then ſuch Taking muſt be proved to be a Breach of the Peace; and though the Goods are the Proſecutor's own Property, yet if he take them in that Manner, he will be guilty.

Anonymous. Trin. 7 Will. 3.

INDICTMENT for Scolding was quaſhed, becauſe it was not ſaid to ⁽³⁾ be *ad magnam perturbationem pacis Domine Regine*, nor *ſubditorum*, or *lige-quaſhed.* *orum ſuorum*.

The King *verſus* Holliday.

THE Caption of an Indictment was *proborum & legalium hominum de Com'* ⁽⁴⁾ *prædicti qui jurati & onerati ſuper ſacramentum ſuum præſentant*, quaſhed, becauſe it did not ſet forth, that they were *onerati*, &c. to inquire for the * King and *the Body of the County*. * Poſtea 19.

The King *verſus* Hemmings and Ghent.

THE Defendants being *Overſeers of the Poor*, were indicted for reſuſing to ⁽⁵⁾ *accompt*, &c. for the Money by them received; and upon a Demurrer to Indictment againſt Overſeers of the Poor, for reſuſing to account. this Indictment it was objected, that it ſet forth they had collected divers Sums of Money, but did not ſay *how much*, and this made the Indictment uncertain: But *Holt Ch. Juſt.* held, that it was neceſſary to ſet forth *how much Money* they had received, it being impoſſible to charge them with every particular Sum, and the Indictment is for reſuſing to come to an Accompt: But a more material Objection was, that the Indictment ſet forth, that they & *eorum uterq;* converted the Money to their own Uſe; but as to that it was held, that the Cheat of one is the Cheat of the other; but laſtly it was objected, that this Indictment would not lie, becauſe another Remedy was provided by * the Statute, and of this the * Poſtea 15. S. P. Court doubted.

The

Indictment.

* P. 188
(6)

* The King *versus* Hall. Hill. 7 Will. 3.

THE Defendant was a *Constable*, and he was indicted *Quod cum Humfredus Hall*, being a Constable, had seized eighty Half-Crowns, which were suspected to be clipped, and refused to deliver them to a Justice of Peace; this was held to be an Offence, but not indictable; besides, the Fact is laid by Way of Recital * *Quod cum*, &c. and not positively.

* Antea Forgery i.

The King *versus* Stonehouse. Pasch. 8 Will. 3.

(7)
Indictment for a private
Wrong not good.
Postea 9. S. P.

INDICTMENT against *Eliz. Stonehouse*, for that she intending to deprive *Henry Bradshaw* of several Sums of Money did falsely and maliciously accuse him of *Felony*, and of robbing her; this Indictment was adjudged ill, because it was for a Fact not indictable, it not being laid by Way of *Conspiracy*, so as to make it a publick Crime; and it being only a private Wrong, the Party hath his Remedy by Action on the Case.

The King *versus* Bakestraw. Pasch. 8. Will. 3.

(8)
Indictment will not lie at
Sessions for Usury.

THE Defendant was indicted at the *Old Bailey* for *Usury*, and being convicted, he brought a Writ of Error, and the Judgment was reversed, because the *Court of Sessions* had no Jurisdiction in this Matter.

The King *versus* Atkinson.

(9)
Indictment for a particular
Wrong not good. Antea
7. S. P.

THE Mayor of *Newcastle*, being a Justice of Peace, made an Order, that the Company of Tanners there should admit one *Young* to be a Freeman of that Company: The Defendant *Atkinson*, who was Master of that Company, and being served with this Order, refused to obey it, and for this he was indicted: But *per Curiam*, 'tis not indictable, for 'tis only a Nonfeasance and particular Wrong done to another.

The King *versus* Savill.

(10)
Quashed for that there
was no Caption.

AN Indictment was quashed, because there was no Caption to it.

* The King *versus* Gorge.

* P. 189
(11)
What is not indictable.

THE Defendants were indicted at the Sessions held in the City of *Worcester*, for keeping an open Shop in the said City, not being free thereof, contrary to an immemorial Custom there; quashed, for 'tis not a Matter indictable.

The King *versus* Brown.

(12)
What is not indictable.

THE Justices made an Order, that the Defendant should pay *Stephen Pain*, a Taylor 7 *l.* for Work done, which he (the Defendant) refusing to do, was indicted, but it was quashed, for 'tis a Matter not indictable.

The King *versus* Bradford.

(13)
1 Ld. Raym. 366.
Indictment quashed, for
that it was not for a publick
Offence.

THE Defendant was indicted for not curing the Prosecutor of an ulcerated Throat, as he had agreed and undertaken to do; quashed, for 'tis no publick Offence, and no more in Effect than an Action on the Case.

The Queen *versus* Steer & al'. Trin. 3 Annæ.

(14)
Mod. Cases 183. Indictment
for taking 20 Carps,
de Bonis & Catallis suis.

THE Defendants were indicted, for that they *piscerunt*, &c. & *viginti Carpas de Bonis & Catallis* of the Prosecutor, did take and carry away: *Per Curiam*, the *Fish* could not be *Bona & Catalla* of the Prosecutor, unless they were

Indictment.

were in a *Stew-Pond* or Trunk, but they might be *Pisces suos* in a close Pond, and this is *ratione loci*, because they could not swim away, but they would not quash it upon a Motion.

Anonymous. Mich. 2 Annæ.

THE Defendant was indicted for Assaulting and Beating a Custom-house Officer in the Execution of his Office, but this Indictment was quashed, because by the Statute 13 & 14 Car. 2. a particular Method of punishing Offenders of this Nature is prescribed, (viz.) By *Fine* and *Imprisonment*, by the Justices of Peace: And *per Curiam*, so it hath been resolved by all the Judges at *Serjeant's Inn*, in a Case between the King and *Watson*.

(15)
Offence not indictable, if another punishment is prescribed by the Statute.
Antea 5. S. P. 13 & 14
Car. 2. cap. 11. Par. 6.

* The Queen *versus* Langley. Hill. 2 Annæ. 2 Ld. Raym. 1029. * P. 190
S. C.

THE Defendant was indicted for saying to the Mayor of *Salisbury*: *You Mr. Mayor, I care not a Fart for you*; and on another Day, for saying to him, *You are a Rogue and a Rascal*, and upon a Demurrer to this Indictment it was insisted for the Defendant, that these Words do not appear to be spoken of the Mayor in the Execution of his Office, and therefore this Indictment would not lie; he cannot be * imprisoned for such Words, neither can he be indicted: *Holt Ch. Just.* These Words are not indictable, because it doth not appear that the Mayor was in the Execution of his Office, nor that he was a Patent Officer, for it would have altered the Case, if it had appeared that he was a *Justice of Peace* by Commission from the Queen, for then he would have been indictable, because the Words would have been an Asperision upon the Queen and upon the Government in general by whom he was employed; but here it doth not appear he was a Justice of Peace, or if he was, it doth not appear that he was so by Commission or Appointment of the Queen, but of the Corporation; 'tis true, if these Words had been *written* as they were spoken of the Mayor, an Indictment would have laid, for *litera scripta manet*, and there are many Cases which prove, that the same Words, when * written, are actionable, which are not so when spoken: *Et per totam Curiam*, Words which directly tend to the Breach of the Peace are indictable, as where one Man challenges another to fight, and the Commission of Oyer and Terminer, *de propalationibus Verborum*, is to be understood of Words spoken against the Government, or which amount to a *Scandalum Magnatum*, &c. But for these little Offences *contra Bonos Mores*, the Law has made a proper Provision, and that is by requiring *Surety of the Peace*, or for the *good Behaviour*, and by committing the Offender if he refuse to find such Sureties, or if he speak such Words in Court, they may proceed in a summary Way against him, by fining him for a Contempt of the Court, and by committing him till he hath paid the Fine: Cases cited *contra*, viz. 1 Cro. 503. 2 Bulst. 139. 3 Mod. 139.

(16)
Mod. Cases 124. Words spoken to a Magistrate not in Execution of his Office, not indictable.
* 11 Rep. 95.
† 3 Cro. 78, 689.
Moor 247. 1 Vent. 16.

* 1 Sid. 270. 1 Lev. 139.

The Queen *versus* Lane. 2 Ld. Raym. 1034. S. C.

THE Defendant was indicted on the Statute 5 Eliz. for using the Trade of a Barber, not having been Apprentice to it for *seven Years*; and a Motion was made to quash it, because it did not conclude *contra pacem*: But *per Holt Ch. * Just.* There can be no Reason for this Objection, for it would be very hard to make a Barber's Shaving a Man by Consent, to be *contra pacem*; besides, 'tis laid to be *contra formam Statuti*, and therefore this Indictment is good. But *per Powell Just.* and the other Judges, every Act which is contrary to the Law is contrary to the Peace, and a Breach of the Peace: Therefore by the other three Judges *contra Holt Ch. Just.* this Indictment was quashed.

(17)
Mod. Cases 128. Indictment for using a Trade quashed, because it did not conclude *contra pacem*.
* P. 191

Anonymous. Trin. 2 Annæ.

THE Caption of the Indictment was *per Sacrum* of the Jury *proborum & legalium hominum*, &c. *jurat' & onerat'*, without saying *impanellat'*; and for that Reason it was moved to quash it, but denied *per totam Curiam*.

(18)
Jurat' & onerat', and did not say impanellat', yet good.

Indictment.

The Queen *versus* Cotesworth. Trin. 3 Annæ.

(19)
Mod. Cases 172. Pro Domina Regina & corpore Com'.
* Antea 4.

THE Defendant was indicted, for abusing Dr. Ratcliff; and it was objected against the Caption, that it was *Juratores pro Domina Regina & corpore Com' jurat' & onerat', &c.* now it should not be * *pro Domina Regina & corpore Com'*; but *pro corpore Com'*; but it was disallowed.

The King *versus* Keate. Hill. 8. Will. 3. 1 Ld. Raym. 138. S. C.

(20)
5 Mod. 287. Upon the Statute of Stabbing, without saying, having a Weapon first drawn, not good.

HE was indicted upon the Statute of *Stabbing*, for that he drew his Sword and stabbed *James Wells*, he *having not first struck*, but did not say, *having not a Weapon first drawn*, and concluded *contra formam Statuti*: The better Opinion was, that the Indictment should set forth, that the Deceased *had not a Weapon first drawn*.

The Queen *versus* Daniel. Hill. 2 Annæ.

(21)
Cited 2 Ld. Raym. 1116.
Mod. Cases, 99. 182.
1 Salk. 380. Indictment for enticing an Apprentice to absent, will not lie.

THE Defendant was indicted for enticing an Apprentice to depart from his Master, & *seipsum absentare* from his Service; it was moved in Arrest of Judgment, that this Indictment was naught, because it did not appear, *how long he absented*, and there was no Averment, that he did absent; 'tis true, 'tis implied, but 'tis not expressly alledged; and as to the Principal Matter, Holt Ch. Just. held, That the seducing an Apprentice to absent was not indictable, because it doth not affect the Publick. But *per Powell* Justice, It doth affect the Publick * as much as the persuading a Woman to absent from her Husband, because it tends to destroy the first Foundation of Society. But *per totam Curiam*, This Indictment is naught, for not averring, that the Apprentice *did absent*; 'tis true, the Word *absentare causavit* implies, that he did *absent*, but an Indictment must not only shew the Cause, but the Effect which follows the Cause. And afterwards in *Trinity Term*, it was adjudged, that an Indictment would not lie for seducing an Apprentice to leave his Master, but only an Action on the Case; or if it was a Forcible taking him away, then an Action of Trespass *per quod servitium amisit*.

* P. 192

The Queen *versus* Tracy.

(22)
Mod. Cases 30. Indictment for persuading a Justice of Peace not to take Bail.

THE Defendant was indicted, for that he procured one *Muriell* the Prosecutor to be arrested by a Warrant from a Justice of Peace, &c. and persuaded the Justice to refuse Bail, but did not alledge, that *any Bail was offered*, and that *when Muriell was committed*, he (the Defendant) *extorted divers Sums of Money* from him, but did not expressly alledge, that *Muriell was committed*, nor what *Sum was extorted* from him; and for these Reasons this Indictment was quashed after Verdict; for it being a complicated Offence, the Defendant must be guilty of all or none, but they would not discharge him without he first entered into a Recognizance to appear to a new Indictment, which he did; and afterwards he was indicted *de novo*, for that he, together with *A. and B.* intending to oppress *Muriell*, did in the Parish of *St. Giles's in the Fields*, in the County of *Middlesex*, procure him to be arrested *pretextu Warranti*, and brought him before one *Chamberlaine*, a Justice of Peace in the Parish of *St. Margaret's* in the said County, and intending farther to oppress him, persuaded the Justice to refuse Bail, *though good Bail was offered*, and to commit him; and avers, that *he was committed*, and that *Tracy* persuaded the Gaoler to lay him (the Prosecutor) in Irons, who by that Means *extorted 5 l. from him, &c.* Upon Not guilty pleaded, the Defendant was found guilty; and now it was objected in Arrest of Judgment, that here was a *Mis-Trial* for the *Venire* was only from the Parish of *St. Giles's*, whereas the Fact did arise from the Parish of *St. Margaret's*, as well as from the Parish of *St. Giles's*. And *per Curiam*, this is a *plain Mis-Trial*, but yet the Defendant hath forfeited his Recognizance, because he was to try the Cause *with Effect*, that is so as the Court may proceed to Judgment; and if Defendants will make such Faults on Purpose, their Recognizances shall be estreated, or a *Scire facias* shall be brought thereon in this Court; for *B. R.* may take either Course, unless the Defendant

Indictment.

Defendant will enter * into a Recognizance, to try it again *de novo*, which accordingly * P. 193 was done, and the Defendant was tried and found guilty again; and it was insisted for him in Arrest of Judgment, that his persuading Mr. Chamberlaine the Justice, to refuse Bail, was only Matter of Opinion, and that the Extortion was not by the Defendant, but by the Gaoler; so that there was no Offence charged in this Indictment against the Defendant, for the Rest is only taking a Man upon a lawful Warrant, which is no Crime. But *per Holt Ch. Just.* he is guilty even of the Oppression and Extortion committed by the Gaoler, because he procured him to be wrongfully put into the Goal; for if *W. R.* wrongfully Imprisoneth *W. W.* and the Gaoler detains him till so much is paid, in such Case, he who was the Prisoner shall have an Action of False Imprisonment against *W. R.* for imprisoning and detaining him until he paid so much Money; and this is a Taking by *W. R.* and it must be illegal to use any unlawful Means to oppress another. It was held in this Case, that wherever a Justice of Peace may by Warrant arrest a Person, he hath Authority to Bail, and that before any Indictment found, the Justice may grant a Warrant for apprehending a Man for a Misdemeanour, and bind him to the Peace, or over to the Sessions.

In the Case above mentioned it was held, that where the Defendant is indicted, he cannot send a Plea into the Office, without giving Security to try it at his own Charge; but if he come into Court, he may put in his Plea, and the Court is bound to receive it, but then he must be committed, unless he give Security to try it; and if he chooses to be committed, then the Trial must go on at the Charge of the Prosecutor, but if he give Security, the Trial must be at his own Charge.

The King *versus* Cross. Hill. 13 Will. 3. B. R. 1 Ld. Raym. 711.
S. C.

THE Defendant was indicted for buying *stolen* Goods, *knowing* them to be stolen; and upon Not guilty pleaded, he was convicted; and it was moved in Arrest of Judgment, that by the Statute the Buyer is made Accessary to the *Felony*, for which he ought to be indicted, and not for a *Misdemeanour* or *Trespass*, at he was in this Case, and so it was adjudged; for *per Holt Ch. Just.* at Common Law this Offence was more than a *Trespass*, it was Evidence as an Accessary not present, but after the Fact was done.

(23)
Indictment for buying stolen Goods, knowing them to be stolen.

* The King *versus* Summers.

THE Defendant was indicted at the Sessions, for Writing a scandalous Letter to one *Mellish* concerning a young Woman, whom he intended to marry: Upon Not guilty pleaded, he was found guilty, and afterwards he brought a Writ of Error, and the Error assigned was, that this was a private Letter, for which he was not punishable by Way of Indictment; or if an Indictment would lie, yet not before the Justices of Peace in their Sessions. *Sed per Curiam*, This is an Offence, and indictable before the Justices in Sessions, because it tends to to the Breach of the Peace.

* P. 194
(24)
1 Lev. 139. Indictment at the Sessions, for Writing a scandalous Letter.

Adjudged, That where a Person came to a Seamstress's Shop, and asked her to shew him some Linen; which she did, and deliverd it into his Hands, and then he run away with it, that this is *Felony*; for though the Goods were delivered by the Owner, yet they were never out of her Possession, because though the Contract might be begun, by asking and telling the Price, yet it was not perfected, and the subsequent Act of his running away doth plainly shew his Intention to take the Goods feloniously before the Property was altered; for which he was indicted, convicted and executed.

Raym. 276. Indictment for *Felony*, in running away with Goods, &c.

So where a Man, who had no Manner of a Title to a House, brought an *Ejectment*, and procured an *Affidavit* to be filed of the Delivery of the Declaration to the Tenant in Possession, and for want of appearing and Pleading, got Judgment at his own Suit and then sued out an *Habere facias Possessionem*, and got a Warrant thereon from the High Bailiff of Westminster, directed to one of his Bailiffs, who, with the Plaintiff himself turned the Defendant out of Possession and

Sid. 254. Raym. 276. Indictment for using the Process of the Law to a felonious Purpose.

Induction and Institution.

and seized all the Goods, and converted them to his own Use; this was adjudged Felony, for which he was indicted, convicted and executed, for he made Use of the Process of the Law, with a felonious Purpose.

* Induction and Institution.

* P. 195

(1)
Seld. Tithes. Ch. 6 par.
2. Ch. 9. Par. 4.

PATRONS did originally fill all Churches by *Collation* and *Livery*, as they do now to free Chapels, till this Power was extorted from them by Canons.

(2)
Noy 134.

Where the *Archdeacon* makes a Mandate for Induction, if 'tis executed by one who is not resident within the Archdeaconry, yet 'tis good.

(3)
Institution alone without
Induction is a Plenarty
against a common Person.
2 Wilfon. 174.

Morgan was admitted and *instituted* to a Benefice, afterwards one *Glover* was presented, admitted, instituted, and *inducted*; then *Morgan* was *inducted*; then *R. R.* the King's Presentee was inducted and entered upon *Morgan*, and *Glover* entered; and the Question was, whether *R. R.* or *Glover* had the better Title; *Et per Curiam*, *Morgan* being *instituted*, that was a *Plenarty* against any common Person, therefore the *Induction* of *Glover* was void, and he had but a mere Possession, which was defeated by the Induction of *R. R.* the King's Presentee, and likewise by the Induction of *Morgan*, who had the first Right, so that each of them hath a better Right than *Glover*, therefore *R. R.* may maintain an Ejectment against him.

1 Roll Rep. 191.

Infants.

Anonymous.

(1)
What Officer he may be,
what not.
* P. 196

IT was held, that an Infant cannot be a *Parson*, *Juror*, *Attorney*, *Bailiff*, or *Member of Parliament*, but he may be a *Mayor*, *Sheriff*, *Gaoler*, or *Steward of a Court*, by Descent, * but not by Purchase, unless granted to him in Reversion, or *ad exercendum per se vel deputatum suum*.

(2)
What Leases made by him
are void and voidable.

That his Lease which he makes, without reserving any Rent, is void; if Rent is reserved, 'tis voidable, and so is a Lease made to him; but his Lease of Ejectment is good.

(3)
What Contracts made by
him are good, what not.

That all Contracts for Necessaries, and which concern his Person are good, as for *Debt*, *Apparel*, *Physick*, or *Learning*, &c. But 'tis otherwise if the Contracts do not concern his Person, as if 'tis to *repair his House* or to *carry on his Trade*, neither shall his Contract to be an Apprentice bind him, unless in *London*, and there 'tis good by the Custom.

(4)

Money borrowed for Necessaries binds him, if he apply it accordingly; but if misapplied, then his Contract is not binding.

(5)

All Acts of Necessity bind him, as Presentations to Benefices, Admittances and Grants of Copyholds, and assenting to a Legacy.

(6)

All his Acts which have no Colour of Advantage to him, or which are without any Consideration, are void, but his Feoffment is only voidable, unless Livery is made by Attorney, and then 'tis void.

(7)

A Judgment by Default, after his Appearance *per Guardianum*, shall bind him, but not if he never appear, or if he doth appear in Person and make Default.

Information.

He cannot answer but by Guardian, but he may sue either by *Prochein Amy* or by Guardian; and his Suit by *Prochein Amy* is by * the Statute, and that is where he sues his Guardian, or where his Guardian will not sue for him. (8)
How he must sue and be sued.
* Jones 177.

His Acts in *Pais*, as Feoffment or other Deeds, may be avoided by Plea or Entry, after or before he is of full Age, and so may his Deed of Bargain and Sale; but his Acts on Record, as his Fine levied, Recovery suffered, or Statute acknowledged, must be avoided by Writ of Error or *Audita querela* during his Nonage. (9)

He is punishable for permissive Waste, for Escapes, for Perjury, for not coming to Church, for Cheating with false Dice, for Batteries, for Slander, &c. (10)
For what he is punishable

* *Ellis versus Ellis*. Hill 9 Will. 3. 1 Ld. Raym. 344. S. C. * P. 197

ASSUMPSIT against an Executor for Money lent to his Testator: the Defendant pleaded, that his Testator was an Infant; the Plaintiff replied, that the Money lent was for Necessaries, and good; for an Infant is chargeable for Money lent, if 'tis laid out for Necessaries, according to his Degree, but all that is at the Peril of the Lender. (11)
5 Mod. 368. See 1 Salk. 386. Earle v. Peale.
He is chargeable for Money lent to buy Necessaries.

Williams versus Harrison. Trin. 3 Will. 3.

ADJUDGED, that if an Infant accepts a Bill of Exchange, he may plead Infancy upon an Action brought against him, because the Custom of Merchants is Part of the Law of the Land; and 'tis not a local Custom, as in London, for an Infant to bind himself Apprentice, &c. (12)
He may plead Infancy to the Acceptance of a Bill of Exchange,

Score versus Bowles. Mich. 2 Will. 3.

IN Replevin against three, they all made Cognizance by Attorney, and Judgment being given for the Plaintiff, a Writ of Error was brought in B. R. and the Error assigned was, that one of the three Defendants was an Infant, but it was disallowed; for per Holt Ch. Just. this Matter was pleadable in Abatement, and therefore not assignable for Error. (13)
Where Infancy is pleadable in Abatement, it shall not be assigned for Error.

* Information.

* P. 198

The King versus Roberts. Pasch. 4 Will. 3. B. R.

INFORMATION against a Common Ferryman, setting forth the accustomed Rates to be, (viz.) for the Passage of a Man and Horse, one Penny, for a Score of Oxen 7 d. for a Score of Sheep 2 d. &c. and that the Defendant being the Ferryman, from such a Day to such a Day, did take of several of the King's Subjects, unknown, divers Sums of Money exceeding those ancient Rates, (viz.) for the Passage of one Man and a Horse 2 d. for every Score of Oxen 12 d. &c. Upon Not guilty pleaded, the Defendant was found guilty, but * the Judgment was arrested for the Uncertainty as to what the Defendant did take, and of whom, and of how many Persons, for every Taking was a separate Offence. (1)
Information not good for the Uncertainty.
* 3 Bull. 317. 2 Cro. 324. 2 Leon. 38. 1 Roll. 80. 1 Mod. 188. Postea 6.

The Queen versus Tayler. Pasch. 2 Annæ. B. R. 2 Ld. Raym. 879. S. C.

INFORMATION against the Defendant, setting forth, that he on the 30th Day of January, proditorie, spoke these Words, (viz.) King CHARLES the First was rightly served in having his Head cut off, and it was a Pity that his two (2)
Information for speaking treasonable Words of the Dead.

Vol. III.

7 P

Sons,

Information.

Sons, CHARLES and JAMES were not served so too; in contemptum Gulielmi tertii nuper Regis, legumque suarum, & ad malum exemplum omnium aliorum in hujusmodi casu delinquentium, ac contra pacem dicti nuper Regis, &c. Upon Not guilty pleaded, the Defendant was found guilty; and it was moved in Arrest of Judgment, that these Words were spoken of the Dead, and they are not averred to be spoken with an Intention to prejudice the Government, and they are not aggravated by the Word *Proditorie*, because that is applicable only to Treason, which this is not. *Sed per Curiam*, these Words affect the Living, though they were spoken of the Dead, and they advance a Commonwealth Principle contrary to Law, and therefore there needs no Averment, that they were spoken with an Intention to injure the Government, for the Words import a Crime of themselves, and endanger the Queen and Monarchy; and though † the Crime is only a Misdemeanor, yet the * Word *Proditorie* is proper in this Information, because this Misdemeanour has a Tendency to Treason, and shews a treasonable Intent in the Speaker. He was fined forty Marks, being but a poor Tanner, and to stand twice in the Pillory.

† See Cro. Car. Hugh Pines's Case.
* P. 199

The Queen *versus* Holford.

(3)
Where a Thing shall relate to the last Antecedent, where not.

INFORMATION against the Defendant for Subornation of Perjury, setting forth, that whereas in *Curia Domini Regis coram ipso Rege apud Westm' in Com' Middlesex* one *Rhodes nuper de D. in Com' Surrey*, Oatmeal-maker, had impleaded the Defendant *Holford*, for that whereas he was indebted to the Plaintiff in the Parish of *St. Clement's Danes in Com' prædict'*, and promised to pay, &c. and that, whereas upon an Accompt stated between them, the Defendant was found in Arrear, &c. and promised to pay, &c. and the Defendant pleaded Not guilty; and at the Trial did procure one *W. R.* to swear, that he was present at the Stating the said Accompt, &c. whereas in truth he was not present, &c. To this Information the Defendant pleaded Not guilty, and the Cause being tried at the *Nisi prius in Middlesex*, he was found guilty; and it was moved in Arrest of Judgment, that the Fine would be entire, and therefore, if either of the Assignments was naught, no Judgment could be given; but this Objection was disallowed, and thereupon another Objection was made (*viz.*) that the Cause of Action being laid in *Surrey*, it could not be tried in *Middlesex*, and here the Cause of Action was laid in *Surrey*; 'tis true, 'tis said, that the Defendant was indebted to the Plaintiff in the Parish of *St. Clement's Danes in Com' prædict'*, which must be in the County of *Surrey*, because that was the County last named, and therefore it must relate to that County, which is very true (*viz.*) *Ad proximum antecedens fiat relatio*; but that Rule hath an Exception (*viz.*) *nisi impediatur sententia*, as it plainly doth in this Case.

The King *versus* Gall. Hill. 10 Will. 3. B. R. 1 Ld. Raym. 370.
S. C.

(4)
1 Salk. 372. Where Prosecutions on Penal Statutes must be in proper Counties.
* Cap. 14.

THE Defendant bought and sold live Cattle in the County of *Norfolk*, not having kept them so many Weeks as required by the Statute * 5 & 6 Ed. 6. and thereupon an Information was brought against him in *B. R.* in *Middlesex*. And per *Holt* Chief Justice, who said ten Judges had resolved these Points.

§ Cap. 4.
* P. 200

1. That the Statute § 21 Jac. 1. did not extend to any Offences created by subsequent Penal Statutes, so that Prosecutions * on such Statutes are not restrained to the proper County; but that Informations upon Penal Statutes made before that Act 21 Jac. 1. must be brought in the proper County where the Fact was done.

* Cap. 4.

2. That an Action of Debt upon the Statute * 5 Eliz. for using a Trade, not having been Apprentice to it for seven Years, must be brought in the proper County where the Offence was committed, and not in *B. R.* unless the Fact was done in that County where the King's Bench sits, and then the Action may be brought in *Middlesex*; and *Holt* Ch. Just. denied the Case of * *Barnes and Hughes* to be Law, which is reported in many Books.

* 1 Vent. 8:

Debt

Inhibition.

Debt upon the Statute 23 H. 6. against the Mayor of *Dorchester* for a False Return of a Burgess to Parliament, by which Statute 40 l. is given to the King and 40 l. to the Party grieved, and not returned, so as he sue for the same within three Months after the Beginning of the Parliament, or to any other Person, who in Default of him so chosen shall sue for the same: The Person chosen did not sue within the three Months, but the Prosecutor after the three Months, and before the End of one Year next following, sued out a *Latitat*, but not within a Year after the Offence: The Question was whether he should be taken to be a Common Informer, and so by the Statute 31 Eliz. ought to bring his Action within a Year after the Offence, which was not done in this Case; for the *Latitat* was sued within a Year after the End of three Months, in which Time the Party grieved was allowed to bring his Action. The better Opinion was, that he was no Common Informer, because there was no Time limited by the Act when the Prosecutor should bring his Action; he stands now in the Place of him who should have brought his Action within three Months, and he was no Common Informer; if he had brought his Action for the Whole 80 l. *tam pro Domino Rege quam pro seipso*, he had been within the Statute; the Plaintiff had Judgment. But *per Holt Ch. Just.* a *Latitat* cannot be a Commencement of a Suit upon a Penal Law, 4 Mod. 129. *Culliford versus Blandford*, at the King's Pleasure: This Statute is confirmed by 20 Rich. 2. cap. 1. with an additional Punishment, viz. a Fine to the King upon a Trial at Bar, the Defendant was acquitted. 3 Mod. 117. Sir *John Knight's Case*.

(5)
Who shall be a Common Informer, and who not.

Information against the Defendant for *Extortion*, setting forth, that there is a Common Passage and Ferry Boat, for transporting People and Cattle, at such Rates, setting them forth; and that the Defendant being a Common Boatman, did *carry at several Times several Persons, and several Score of Sheep, and that during that Time he did extort *de quibusdam ignotis*, for the Use of the said Boat in transporting, (viz.) *pro transportatione cujuslibet equi 2 d. Et pro quibuslibet viginti ovibus 4 d. Et sic secundum ratam*; after a Verdict for the Informer, it was moved in Arrest of Judgment, that the Information was ill, because 'tis not said from whom he extorted those, but only *de quibusdam ignotis*, and no particular Time is mentioned when he extorted, nor how many Score of Sheep were carried over. *Et per Curiam*, every Taking is a several Offence, and if this Information should be good, it may as well be said, that an Indictment for Battery will be good, setting forth, that he beat so many of the King's Subjects between such a Day and such a Day: the Judgment was reversed. 4 Mod. 1000. *The King v. Roberts*.

(6)
Antea 1 S. P.

* P. 201

Inhibition.

Lunne versus Dodson. Pasch. 13 Car. B. R.

AN Inhibition is either *hominis* or *juris*; 'tis *ne visitationem facias, vel aliquam jurisdictionem Ecclesiasticam contentionem vel voluntariam habeas*: Thus when an Archbishop visits, he inhibits the Bishop, when a Bishop visits, he inhibits the Archdeacon; and the Reason is to prevent Scandal and Distraction, and this continues till the Relaxation of the Inhibition, which is not till the last Parish is visited, and then 'tis entered *nulla Parochia restat visitanda*, for he may hear of no Faults till he come to the very last Parish.

(1)
The Effects of an Inhibition. Burn Eccl. Law, Tit. Inhibition.

Now after such an Inhibition upon a Metropolitanical Visitation, if a Lapse happens, the Bishop cannot institute, because his Power is suspended, and therefore the Archbishop is to institute; for 'tis not only Penal in the Bishop so to do, but the *Institution itself is void, because 'tis an Act of Jurisdiction from which he was suspended.

(2)

* P. 202

But it may be a Question, in the Case of a Collation, whether, if a Lapse happen the Bishop may collate, because 'tis a Kind of Title; but the better Opinion

(3)

Innuendo. Joinder in Action.

Opinion is, he cannot, because 'tis not by Way of Interest, but by Way of Provision for the Cure, and to supply the Negligence of the Patron; this appears, because the Patron may present at any time after a Lapse, and before Collation.

Innuendo. See Libel, 4.

Joinder in Action.

(1)
Who may join in an
Action. 2 Wilson 414.

ADJUDGED, That where two or more receive a joint Damage, they may join in an Action; as where two Churchwardens brought a *Mandamus* to the Official to swear them, who refused and made a False Return, they may join in a suit against him for such False Return; but where the Damages are several, the Parties cannot join.

(2)
Where the Action must be
several, and not joint.
1 Wilson 171. S. P.

A. owed 20*l.* to B. as Executor, and 10*l.* more in his own Right, one Action will not lie against him for the whole Money, because there must be several Judgments.

(3)
6 Rep. 87. 1 Vent. 223.
366. What Actions may
be joined, and what not.

An *Action on the Case* and an Action of *Trespass*, or *Case* and *Trover*, may be joined in one Action, because the Foundation of both are on a Wrong, and Not guilty is a good Plea to the Whole; but *Assumpsit* & *Trover* cannot be joined, because there must be different Pleas. See 2 Wilson 319. as to this Point.

(4)
Sid. 245. 2 Wilson. 319.
* P. 203

* *Case and Trover* was brought against a *Carrier* for Money delivered to him, this was adjudged ill after a Verdict, because 'tis not founded on a Wrong alone, but on the Custom of the Realm, and a general Verdict could not be given.

(5)
1 Lev. 107. Sid. 157.
Raym. 80. Where two
may join in one Action.

The Lessor made a Lease to *W. R.* who covenanted to repair, afterwards the Lessor assigned one Moiety of the Reversion to *B.* and the other Moiety to *C.* adjudged, that both of them may join in one Action of Covenant against *W. R.* the Lessee for not repairing, for 'tis no more than a personal Action to recover Damages, in which *Tenants in Common* may join.

(6)
What Actions may be
joined, what not.

In Actions personal, where a Tort is by Common Law, and a Tort by Statute, they cannot be joined; so 'tis where a Contract is by Common Law and by Custom.

(7)
† *Trespass vi & armis*,
and *Trespass on the Case*
cannot be joined, be-
cause they require differ-
ent Judgments. 2 Wil-
son 319.

But where several Torts are by Common Law, they may be joined, if personal; as for Instance, *Trespass for several Trespases, or Trespases and Case* †.

(8)
1 Wilson 252.

So where several Contracts are by Common Law, as Debt upon several Bonds; Debt upon a *Mutuatus* and *Judgment*, or Debt for Rent and *Indebitatus* for Money lent; for though one Plea will not answer both, as in an Action of Debt upon a Judgment and upon a *Mutuatus*, yet there is the same Process and Judgment, but 'tis not so in Torts and Contracts, for the Process and Judgment are not the same.

Boson versus Sandford. Hill. 2 Will. 3. B. R.

(9)
3 Lev. 258. 3 Mod. 321.
2 Salk. 440. Where the
Action is quasi ex con-
tractu it must be brought
against all.

CASE. &c. in which the Plaintiff declared against six Defendants, setting forth, that he loaded a Ship whereof they were Owners, and that they undertook the goods should be carried safely, but that by their Negligence the said Goods were damaged by fresh Water; upon Not guilty pleaded it appeared at the Trial, that there were more Part-Owners of this Ship than these six Defendants, and because all the Part-Owners must be equally liable, the Action being

Jointenants and Tenants in Common.

ing *quasi ex contractu*, the Court held, that the Defendants should take Advantage of it in Evidence; for where the Plaintiff brings an Action on the Case, he ought to declare according to the Truth of his Case; and if the Jury find a Contract made by more than against whom the Plaintiff had declared, 'tis a Variance, and if this had been pleaded in Abatement with a Traverse, *Absque hoc quod super se* * *Assumpsit tantum*, it had been ill, because 'tis no more than the General Issue. * P. 204

Dalson *versus* Tyson. Trin. 7 Will. 3. B. R. Ld. Raym. 48. S. C.

THE Plaintiff declared against a *Common Carrier*, and one Count was in *Assumpsit*, and the other was in *Trover*; this was adjudged ill after a Verdict, for the one sounds in *Contract* and the other in *Tort*; the like Case is 1 Sid. 244. but ill reported: *Et per Holt Ch. Just. Tenants in Common* may either join or sever in Debt, but in *Avowry* they must sever, because it goes to the Realty, therefore if three Tenants in Common distrain three Beasts, each of them must avow for one Beast. (10) 5 Mod. 90. 1 Salk. 10. Vent. 233. *Assumpsit* and *Trover* cannot be joined. 2 Wilfon 319. they may be joined, because the same Judgment in both.

Jointenants and Tenants in Common. See Joinder in Action, 10.

"The Serjeants Observations on this Title are chiefly what was said by
"Holt Ch. Just. in *Fisher* and *Wigg's Case* herein after mentioned."

WHERE there are two *Jointenants for Life*, each of them hath an Estate for his own Life and for the Life of his Companion; and for that Reason, if one of them makes a Lease, it shall continue not only during the Life of the Lessor, but after his Death, during the Life of his Companion; for the Lease, which is only derivative, shall continue as long as the original Estate out of which it was derived. (1) What makes a Tenancy in Common and what a Jointenancy. † 1 Roll. 441. 1 Wilfon 341.

But this seems contrary to another Resolution, where it was held, that he hath only an Estate for his own Life, and a *Possibility of surviving his Companion to be intitled to his Part; and therefore if he grant over his Estate, that Possibility is gone, and if he die, the Estate of the Grantee shall revert to him in the Reversion. (2) Jones 55. in *Eustace's Case*. * P. 205

Goods, or a *Term for Years devised to two equally*, makes a *Tenancy in Common* and not *Jointenants*, because an equal Benefit is intended to both, which cannot be if all must survive to one; but *Lands to two equally* makes a *Jointenancy*, for having them for Life there is no Inequality between them; but a *Devise to two equally and to their Heirs* makes a *Tenancy in Common*, because the Word *Heirs* would be in vain if they were *Jointenants*. (3) 3 Cro. 697. Dyer 25.

So a *Devise to Two, Part and Part alike*, they are *Tenants in Common* and not *Jointenants*, for there can be no Parties between *Jointenants*: § But a *Devise to two equally to be divided by W. R.* they are not *Tenants in Common* till after the Division is made. (4) § Gouldf. 183.

Devise to his two Sons, and to the Heirs of their Bodies, but that his Executors shall enjoy it till they come to their several Ages; the Sons are *Jointenants for Life*, because the Estate hath several Commencements, for each may enter at his full Age, but not to gain an Estate, but only the Possession and Profits. (5) 2 Cro. 259. Yel. 183. 1 Bulst. 42.

† Devise to Two, equally to be divided, and to the Survivor, they are *Jointenants* by Virtue and Force of the last Word. (6) † Vent. 216.

|| Where a Bond is made to Two, the Obligees are *Jointenants*, and the Survivor shall have the Bond and the Duty; so of Covenants, Debts, and Contracts at Common Law. (7) || 1 Inst. sect. 282.

Jointenants and Tenants in Common.

(8)
2 Vent. 113.

Three were *Jointenants of Goods*, and two of them brought an Action of Trover, without the other; adjudged, that the Defendant might plead this Matter in Abatement; but if he plead Not guilty, the Plaintiffs shall not be nonsuit, though this Matter appears upon Evidence, but shall recover Damages for their two Parts.

(9)
1 Vent. 78. 2 Saund. 96.

One *Jointenant* granted, bargained and sold all his Estate and Interest to the other; adjudged this is a good Coveyance, and shall pass his Moiety to his Companion, for the Word *Grant* amounts to a Release, Confirmation and Surrender, as well as to a Gift, but then the Party must plead it as a *Release*, for one * *Jointenant* cannot grant to another, therefore he must plead *quod relaxavit*, and not *quod concessit*.

* P. 206

(10)

Two *Tenants in Common*, W. R. brought Trespass against one of them; adjudged, that he may plead in Abatement, that he is Tenant in Common with another, but if he pleads Not guilty, he cannot give it in Evidence.

(11)
1 Vent. 214. 2 Lev. 113.

And yet if one *Tenant in Common* bring an Action of Trespass against another, the Defendant may give it in Evidence; the Law is the same between *Jointenants*.

(12)
Noy 157.

Two *Jointenants for Life*, one made a Lease for ninety-nine Years, to commence after his Death, if the other should so long live; the other surrendered: *Et per Curiam*, the Lease is good in Point of Creation, and shall continue, though the Lessor dies, if the *Jointenancy* had continued; but that being severed by the Surrender of the other, there can be no Survivorship, and therefore the Lease will determine by the Death of the Lessor, for his Lease as to Survivorship depends upon the Continuance of the *Jointenancy*, which was only a mere Possibility, and is now destroyed, and by Consequence the Lease is so too, and so it would have been if they had made Partition; but it had not been so if both of them had joined in the Lease, and afterwards had made Partition or surrendered.

Fisher *versus* Wigg. Hill. 12 Will. 3. 1 Ld. Raym. 622. S. C.

(13)
1 Salk. 391. Surrender to the Use of his Children, equally to be divided, and to their Heirs respectively, makes a *Jointenancy*.

* Yel. 23. Dyer 10.

* P. 207

THE Case was, *ff.* The Father being seised of a Copyhold of Inheritance, surrendered the same to the Use of his five Children, *equally to be divided, and to their Heirs respectively*; the Question was, whether they were *Jointenants* or *Tenants in Common*: And *per Gould* and *Turton* Justices, they are *Tenants in Common*, because the last distributive Words (*viz.*) *and to their Heirs respectively*, shew, that it was the Intent of the Surrendoror it should be so, which, in the Case of a Copyhold and of an * Use ought to be pursued: But *per Holt* Ch. Just. *They are Jointenants*; as to this Estate being Copyhold, that is not to be regarded, for that will no more pass by improper Words than other Estates, and this is not properly an Use, for there is no *Cestui que Use* in this Case, nor any Statute Operation, but the Surrendrees are in from the Lord of the Manor, and the Surrender to the Use of such Persons shews only the Intention of serving such Estates and Limitations, so that this Use is no more than a Gift to five Children, *equally to be divided*, and that is a *Jointenancy* and not a *Tenancy in * Common*, and for these Reasons following; First, because the Words *Equally to be divided*, import no more than the precedent Words implied (*viz.*) that the Children should have all alike, which they cannot have if they are not *Jointenants*. Secondly, the Words *Equally to be divided*, doth not make them *Tenants in Common*; because, as *Tenants in Common* they must be seised *pro indiviso*, as to the Possession, whereas those Words, divide their Tenancy and Possession, and whenever the Estate comes to be divided, they cease to be *Tenants in Common*; therefore 'tis absurd to say, that those Words create an *Estate in Common*. And lastly, *Jointenancy* is favoured in Law, which neither loves Fractions or Divisions of Estates; but if this was a *Tenancy in Common*, then the Tenements and Tenures would be multiplied, for here would be five Copyhold Estates, and five Fines to the Lord of the Manor, instead of one before.

Pullen

Issues Joined.

Pullen *versus* Palmer. Trin. 8 Will. 3. 1 Ld. Raym. 496. S. C.

IN *Replevin* for taking several Cattle, the Defendant avowed in his own Right, for that *W. R.* was seized in Fee of, &c. and granted a Rent-Charge to *A. B.* and *C.* and ten more, who granted to the Defendant *and to twelve more*, and that four of the said thirteen are since dead, and *nine alive*, of whom he is one, and that for one Year's Rent due at such a Time, he distrained: Upon a Demurrer to this Plea it was objected, that the Defendant ought not only to justify in his own Right, but that he ought likewise to make Conusance as Bailiff to the Rest, who were living: *Et per Holt Ch. Just.* One Jointenant may distrain, but he cannot avow solely, and therefore this Avowry must abate, because 'tis always upon the Right, and the Right of this Rent is in all of them; and therefore the Court cannot adjudge the Right of the *Retorn' Habend'* to one alone; for which he (the Defendant) ought to have made Conusance, as Bailiff to the Rest; and this is like a * Repleader, where the Defendant may avow *de novo*. * Inft. 146. a. Tenants in Common may join or sever in Debt, but they must sever in Avowry, for the Reason before-mentioned (*viz*) because it goes to the Realty; and therefore, if three Tenants in Common distrain thirty Beasts, one of them must avow for ten, the other for ten, and the third for ten more. But *per Curiam*, † the Husband may distrain for Rent due to his Wife, and avow for it alone; because the Right of the Rent due is in him alone. † 2 Cro. 282.

(14)

5 Mod. 71, 150. One Jointenant may distrain, but cannot avow alone.

The essential Difference between *Tenants in Common* and *Jointenants* is, that *Tenants in Common* hold their Lands either by several Titles or several Rights, but *Jointenants* hold * them by one Title and by one Right; but there is no Difference between them as to the Possession, and the Manner of taking the Profits. * P. 208

(15)

The Difference between *Tenants in Common* and *Jointenants*.

Tenants in Common were not compellable at Common Law, before the Statute, to make *Partition*, no more than *Jointenants*; and *per Holt Ch. Just.* in suing out a Writ of *Partition*, the Party never shews whether he is a Tenant in Common or *Jointenant*. *Co. Ent.* 413.

(16)

Tenants in Common not compellable to make *Partition*.

Issues Joined.

IN *Replevin* the Defendant avowed for Rent Arrear upon a Lease made to him 11 *Octob.* 11 *Regis apud F.* The Plaintiff in Bar replies, that the Avowant did not make the Lease to him on the said 11 *Octob.* 11 *Regis apud F.* in Manner and Form, &c. and upon Demurrer to this Replication, *per Curiam*, the Day and Place are here made Part of the Issue, whereas they are not material, for a Demise at any other Time and Place would be sufficient; he should have replied, *non demisit modo & forma*.

(1)

2 Lev. 12. Where the Day and Place is made Part of the Issue, 'tis not good. See *Postea* 6.

In Covenant upon a Lease, the Breach assigned was for *Non-payment of Rent*; the Defendant pleaded *nil debet*; adjudged upon a Demurrer to be an ill Plea.

(2)

3 Lev. 170. In Covenant, &c. where *nil debet* is no good Plea.

The Plaintiff sued as Administrator; the Defendant pleaded, that *W. R.* was Administrator, and yet alive; the Plaintiff replied, that *W. R.* was not alive, and concluded to the Country; and upon a Demurrer to this Replication, it was adjudged ill, for though the Matter is Contradictory, yet there must be a Negative and an Affirmative to make an Issue.

(3)

1 Vent. 213. There must be a Negative and Affirmative, to make an Issue.

Debt upon Bond conditioned to pay all such Sums as should be expended in such a Matter; the Defendant pleaded Payment, & *hoc paratus est verificare*; the Plaintiff replies *Non-payment*, & *hoc paratus est verificare*, and upon a Demurrer

(4)

Raym. 98. Where the Plea, *hoc paratus est verificare*, is not good.

Issues Joined.

to this Replication it was adjudged ill, for he ought to have *concluded to the Country*.

* P. 209

(5)
1 Saund. 112. Where hoc paratus est verificare is a good Plea.

* Postea 10.

* In Debt upon Bond conditioned to render an Account of all such Goods of *W. R.* as came to his Hands; upon Oyer the Defendant pleaded, that no Goods of *W. R.* came to his Hands, and averred his Plea; the Plaintiff replied, that a *Silver Bowl* of *W. R.*'s came to his Hands, and he likewise aver'd his Replication. *Et per Curiam*, 'tis well concluded, for the Matter is * new; but if it had been expressed in the Condition, then he ought to have concluded his Replication, *& hoc petit quod inquiretur, &c.* But here it was out of the Condition, and perhaps the Defendant may have new Matter to rejoin; as, that the Bowl was given to him, *&c.* But 1 Sid. 341. is denied to be Law.

Yates *versus* Herlakenden. 9 Will. 3. B. R.

(6)
See Antea. 1. Where the whole Time is put in Issue.

IN Covenant against an *Apprentice*; the Breach assigned was, that he (the Defendant) *penitus decessit* from his Service at such a Time, *& abinde continue to such a Time*; the Defendant pleaded, that he did not depart from his Service, and *continue from it as the Plaintiff* had alledged; to which Plea the Plaintiff demurred, because the *whole Time* being put in Issue, the Defendant ought to have pleaded, he did not continue out of his Service for the Time alledged in the Declaration, nor for any Part thereof.

3 Cro. 84. Dyer 115. B.
1 Inst. 282.

Holt Ch. Just. In a General Issue, as Waste for cutting twenty Trees, the Defendant must plead, that he did not cut the said twenty Trees, *nor any of them*; but 'tis otherwise in a *Collateral Issue*; as for Instance, in an Action of Debt, upon a Bond conditioned not to commit Waste, and the Breach assigned, that he did commit Waste in cutting twenty Trees, 'tis sufficient for the Defendant to plead he did not cut twenty Trees *modo & forma*, as the Plaintiff hath alledged, for in such Case he is only to meet with his Adversary; but upon the Evidence, if it appear that he cut down one Tree, the Plaintiff shall have a Verdict.

Hall *versus* Stich. 5 Will. 3. B. R.

(7)
Where the Words *super patriam* were left out the Issue is only informal, there being an Affirmative and Negative before.

* P. 210

IN *Ejectment* for Lands in the *County Palatine of Durham*: Upon Not guilty pleaded, the Plaintiff had a Verdict; and upon a Writ of Error brought, the Error assigned was, that there was no Issues joined between the Parties, for the Words *super patriam* were left out; but *per Curiam*, here is an Affirmative and a Negative, and that makes an Issue; 'tis true, * it had been better if those Words had been in, but the Omission of them only makes the Issue informal, so they affirmed the Judgment.

Skinner *versus* Kilby. Mich. 1 Will. 3. Intratur. Trin. 1 Will. 3. Rot. 833.

(8)
Where hoc parat' est verificare is not good.

* Yelv. 138. Cro. Car. 164.

IN Covenant, the Plaintiff assigned a Breach, in *Nonpayment of Rent*; the Defendant pleads, that *he paid it, & hoc paratus est verificare*; and upon a Demurrer to this Plea, it was adjudged ill, because it was an Affirmative to what went before, for that was a Negative (*viz.*) in *Nonpayment of Rent*, and therefore the Defendant ought to have concluded to the * Country, for otherwise Pleadings would be Infinite.

Allen *versus* Symms. Trin. 6 Will. 3. Rot. 299.

(9)
Where one Affirmative is in Answer to another, it ought to be averred, and not to conclude to the Country.

IN *DEBITATUS Assumpsit* against *Richard Symms*, who pleaded *Quod ipse idem Richardus versus quem, &c.* is called *Richard Symond*, and *traversed*, that he is called *Richard Symms, & hoc, &c.* The Plaintiff replied, that the Defendant was called and known as well by one Name as by the other, *& hoc paratus est verificare*; and upon a Demurrer to this Replication, *per Curiam*, the Defendant may well enough say, that *ipse idem Richardus* is called *Richard Symms*, for he may own his Christian Name, and plead a *Misnomer* to his Surname.

But

Judgment.

But in this Case all is discontinued by the Plaintiff's Replication, because he averred his Plea, when he ought to conclude to the Country. *Sed per Curiam*, where one *Affirmative* comes in Answer to another *Affirmative*, in such Case it ought to be averred, and not conclude to the Country; but 'tis otherwise, where an *Affirmative* comes in Answer to a *precedent Negative*; therefore in this Case the Defendant having added a *Traverse* to his Plea, the Plaintiff ought to have concluded his Replication to Issue (*viz.*) * to the Country; for in Pleas the *Traverse* is as a Negative, and every general Negative must conclude to the Country; So that in this Case the *Misconclusion of the Replication had made a Discontinuance*. * Dyer 353. 2 And. 6. Yelv. 138. Thomp. Ent. 1. No. 4. Rast. Ent. 515, 516.

* Loder *versus* Loder. Mich. 2 Will. 3. B. R. Rot. 506. * P. 211

DEBT upon Bond against an *Administrator cum Testamento Annex*; the Defendant prayed Oyer of the Condition, which was, that *W. R.* should not revoke his Will, and pleaded, that the said *W. R.* did not revoke his Will; the Plaintiff replied, that after the said Will the said *W. R.* made another Will, and thereby he did revoke the first Will, *Et hoc paratus est verificare*; and upon a Demurrer to this Replication it was adjudged, that though this is an *Affirmative* to a *precedent Negative* in the Plea, yet the Plaintiff needs not conclude to the Country in his Replication, but aver it as he had done, because in the Replication * new Matter was suggested, and therefore he ought to conclude *Et hoc paratus est verificare*. * Antea 5. S. P.

Watts *versus* West. Pasch. 12 Will. 3.

ACTION against the Mayor for a false Return, *Et c.* the Practice was agreed to be, that where the Defendant pleads the *General Issue* and 'tis not entered, he may within *four Days of the Term* waive that Issue and plead specially, and if *Sunday* happen to be one of the *four Days*, then *Monday* shall be allowed; so likewise where the Defendant pleads in *Abatement*, he may at any Time after waive the Special Matter and plead the *General Issue*, unless there is a Rule made for him to plead as he will stand by it.

Marckar *versus* Harris. Mich. 4 Will. 3.

IN an Action of Debt for Rent; the Defendant pleaded, that the Plaintiff *Nil habuit in tenementis*; the Plaintiff replied, that he was possessed of the Tenements by Virtue of a Lease for forty Years, made to him by the Lord *Wotton*, who had Power to demise the same; and upon a Demurrer to this Replication it was adjudged good, without setting forth the Title, for *Nil habuit in Tenementis* is the Issue, and the Plaintiff may reply, *quod satis habuit in Tenementis*, (*viz.*) in Fee or Tail, *Et c.* and at the Trial Evidence may be given of any other Estate, because the particular Estate alledged in the Pleading is only Form, where the Issue is *Nil habuit in Tenementis*.

* Judgment.

* P. 212

Judgment shall have Relation to the first Day of the Term, as if it was given on that very Day, unless there is a *Memorandum* to the contrary, as where there is a *Continuance* of the Cause till another Day in the same Term, *per Holt* Ch. Just.

In Trespass for Taking a Gelding, the Defendant pleaded, that in such a County Court, *coram* * *señatoribus ejusdem Curie per considerationem Curie debito modo recuperavit versus præd* the Plaintiff 4 *l. tam occasione cujusdam insultus* & *transg. eidem defenden per prædict* the Plaintiff, and such a one his Wife *illat*, *quam pro mis. Et custagiis, Et c.* and upon a Demurrer to this Plea it was adjudged ill, because here was a Judgment in an inferior Court pleaded without any *Plaint*

Judgment.

levied; and because the Names of the *Suitors* are not set forth, and the Judgment is pleaded as obtained against the *Husband*, when the Action was brought against *Husband and Wife*.

(3)
After a Rule to sign Judgment there must be four Days exclusive.

After a Rule to sign Judgment, there ought to be four Days before the Judgment is signed, and those four Days are computed exclusive of that Day on which the Rule was made, and of that on which the Judgment was signed; and this is because the Party may have a reasonable Time to bring a Writ of Error, if he think fit so to do, but in the Common Pleas they stay till the *quarto die post* without any Rule, but that Day is inclusive in that Court.

(4)
Judgment cannot be affirmed for Part and reversed for Part.
* See 2 Cro. 349. Jacob v. Mills. But that Case is since denied to be Law. Allen 75.

Assumpsit upon two several Promises, one was found for the Plaintiff and the other for the Defendant, and Judgment for the Plaintiff as to one, and *Nil capiat, &c.* as to the other; *sed sit in misericordia*, the Defendant brought a Writ of Error and assigned for Error the Omission of the Words *eat inde sine die: Et per Curiam*, * the Judgment shall be reversed for the Whole, because it being an entire Thing cannot be reversed for one Part and affirmed for the other Part.

(5)
Warrant of Attorney not to be signed by a Person in Custody, unless an Attorney is present. Postea 14.

Regula. Pasch. 15 Car. 2. B. R. It was ordered by the Court, that an Officer shall not take any Warrant to confess a Judgment of any Person in his Custody unless an Attorney for the Defendant is present, and subscribes his Name to such Warrant.

* P. 213

* Banbury's Case. Hill. 6 Will. 3. B. R.

(6)
Every Judgment must be both complete and formal.

PER Holt Ch. Just. Every Judgment must not only be complete, but also formal, therefore if a *Quo Warranto* is brought against the Defendant for usurping *Royal Franchises*, and the Court should give Judgment that he has no Title, yet unless they go on and say, *quod abinde excludatur*, 'tis ill; so in Debt upon a Bond, if the Defendant plead *auterfoits acquit* in an Action upon the same Bond, and the Judgment was, that he (the Defendant) should recover Damages, * *Et eat inde sine die*, that is naught without saying further, *quod querens nil capiat per Billam*, because *Dismissio* is no Judgment in a Court of Law: And *per Holt Ch. Just.* If Trespass is brought for a Trespass done in Lands belonging to such a House, though it appear at the Trial that the Plaintiff had no Title to the House, yet the Court cannot give Judgment to turn him out, because it was not judicially before them.

* 1 Vent. 27, 39. See Jacob v. Mills. 2 Cro. 349.

Morrice versus Green. Pasch. 11 Will. 3. B. R.

(7)
What is a Judgment by Nihil dicit.

I N this Case it was held, that a Judgment by *Nihil dicit* is where one is in Court, and required to make answer to what is objected against him, but he is silent and says nothing in his Defence.

(8)
Departure in Contempt of the Court.

There is likewise a Judgment for departing in Despite of the Court, and that is where the Party appears, and being to attend that Day, goes out of the Court without Leave of the Court, as in *Common Recoveries* where the common Vouchee comes in and pleads *nul Tort, nul Disseisin*, and then the Demandant impails generally, and not to a Day certain; and for that Reason the Vouchee is still obliged to attend the Court, but doth not; then the Entry is, *Postea eodem die revenit* the Demandant, and because the Vouchee is not there but is departed, therefore the Demandant hath Judgment.

(9)
What is a Judgment by Default.

And lastly, There is a Judgment by *Default*, and that is where the Party hath a Day certain, and is demandable, and being demanded doth not appear, whereupon Judgment is given against him by Default; and these are distinct Judgments, which cannot be used the one for the other. See *Co. Entr. 269. a. Rajt. Ent. 173. b.*

Judgment.

* Anonymous. Mich. 10 Will. 3.

* P. 214

(10)

UPON a Motion to stay Execution on a Judgment upon Pretence of an Agreement since the Judgment entered: *Per Holt Ch. Just.* where the Judgment itself was confessed and entered upon Terms, the Court will lay their Hands on it and see it performed, because 'tis no more than a conditional Judgment at first; but where the Judgment is absolute at first, there the Party shall be put to his Action upon any subsequent Agreement concerning it, or may bring an *Audita querela*, for the Court will not stay Execution upon a Motion; and in this Case the Chief Justice said, that he did not pretend to dispence Equity at large, but only by the Consent of the Parties, upon a Rule of Court.

Where Execution shall be stayed on a Motion, where not.

Kirle *versus* Clifton, Trin. 1 Will. 3. B. R.

UPON a Writ of Error in B. R. to reverse a Judgment in C. B. the Defendant in Error pleaded a *Release of Errors*, and upon a Demurrer to this Plea, it was doubted what Judgment should be given, for the first Judgment being erroneous, the Court could not affirm it: *Sed per Curiam, A nil capiat per Breve* shall be entered.

(11)

Upon a Writ of Error, &c. the Defendant pleaded a Release of Errors, the Judgment shall be Nil capiat per Breve.

Western *versus* Crefwick.

JUDGMENT against the Defendant in an Action of Debt on a Bond, and upon a *Fieri facias* directed to the Sheriff he took some of the Defendant's Goods and sold them, afterwards this Judgment was reversed; and upon a Motion to bring the Money into Court for which they were sold, or to pay it to the Defendant himself, the Court would make no Rule, for the Goods might be sold for less than they were Worth, therefore the Defendant may bring an Action of Trespass, if the Plaintiff doth not agree with him.

(12)

4 Mod. 161. Goods were levied by a Fi. fa. and sold, and afterwards the Judgment was reversed.

Davenant *versus* Rafter.

JUDGMENT in C. B. by *Nil dicit*, and upon a Writ of Error in B. R. the Error assigned was for Want of an Original; the Defendant in the Writ of Error pleaded a *Release of all Errors*; the Plaintiff replied, that the Release set forth by * the Defendant recited a Judgment obtained by him for 600 l. Debt and Damages, *ultra mis' & custagia*, and that this Release was of Errors in that Judgment; but the Judgment on which the Writ of Error was now brought, was for 600 l. *Debt and Damages only*, and therefore this must be another Judgment; and if so, then the Errors in such Judgment are not released. *Sed per Curiam* in C. B. if the Judgment is by Confession, 'tis always there entered *pro debito & damnis*, without any further Addition; but in B. R. 'tis entered *tam pro debito & damnis, quam pro mis' & custagiis*; but between Damages and Costs there is no material Variance, for Damages include Costs.

(13)

No material Difference between Costs and Damages.

* P. 215

Standfast *versus* Chamberlaine.

IN Ejectment, the Plaintiff had a Verdict at the Assizes; *per Curiam*, the Judgment ought not to be signed till four Days after the Return of the *Postea*, which happened to be on the 6th of May, and on that very Day the Judgment was signed, but the Plaintiff did not take out Execution till two Days after the Signing the Judgment, so that the Defendant had Time enough either to bring a Writ of Error, or to move in Arrest of Judgment; yet because it was signed on the fourth Day after the Return of the *Postea*, when that Day ought to be *Exclusive*; it was adjudged to be irregular, and therefore the Judgment was set aside, and the Party had Restitution.

(14)

5 Mod. 205. Antea 5 S.P. Judgment signed four Days after the Return of the *Postea*.

Jurisdiction.

(1)
How the Jurisdiction of Ecclesiastical Courts arises.

THE Jurisdiction of Ecclesiastical Courts arises either as Incident or Principal; and then 'tis either from the Nature of the Thing, as Causes Matrimonial and Testamentary, or from the Person, as Beating a Clerk, or from the Place, as Scolding in the Churchyard, Cutting Trees there, or contemptuous Words spoken in Court.

(2)
Where both Courts have a concurrent Jurisdiction.

In some Causes the Spiritual and Temporal Courts have a concurrent Jurisdiction; as where a Man is intitled to a Pension by Prescription, he may sue for it in either Court.

* P. 216

(3)
1 Saund. 14. 1 Sid. 330.
What shall not be intended to be out of the Jurisdiction.

* Now as to Pleading a Jurisdiction, it hath been adjudged, that where an *Indebitatus Assumpsit* was brought in *Durham pro mercimoniis venditis*, without saying *ibidem*, this is good; for a Court of a County Palatine is an original Superior Court, and therefore it shall be intended, that the Contract was made within the Jurisdiction, though 'tis not set forth in the Declaration; for nothing shall be intended out of the Jurisdiction of a Superior Court but what Specially appears to be so.

(4)
Sid. 342. Where the Cause of Action is laid infra jurisdiction.

So where Matter of Aggravation is not laid to be within the Jurisdiction of any Inferior Court; yet, if the Cause of Action be laid to be *infra jurisdictionem*, 'tis well enough.

(5)
Sid. 86, 95. Where Words must be laid to be spoken infra jurisdictionem.

Case for Words *per quod she lost her Marriage*, if the Speaking be laid within the Jurisdiction, and not the Loss of Marriage likewise, 'tis ill, because that is the Cause of Action; otherwise, if the Words had been actionable in themselves.

(6)
Sid. 105. In all Assumpsits it must be infra jurisdictionem.

In all *Assumpsits* the Consideration must be laid to be *infra Jurisdictionem*.

(7)
1 Vent. 100. Where an Assumpsit will not lie for carrying Goods extra jurisdiction.

An Agreement was made within the Jurisdiction of the *Marshalsea* to carry Goods to *York*, an *Assumpsit* will not lie in that Court, as upon an Agreement to carry Goods to *York*, because the Carrying is out of the Jurisdiction of that Court; but the Plaintiff may declare generally, that the Defendant being indebted to him for Carriage, he promised to pay, so nothing will appear to be out of the Jurisdiction.

(8)
1 Vent. 73. Cases for suing in Inferior Court.

Case lies against the Plaintiff for suing him in an Inferior Court, where the Cause of Action arises out of its Jurisdiction.

* P. 217

* Justices of Peace.

The Queen *versus* Burnaby. Trin. 3 Annæ. 2 Ld. Raym, 900. S. C.

1 Salk. 181.
* 27 Eliz. c. 7.
§ 3 Cro. 821. 5 Rep. St. John's Case. Where Property is in Question, the Justices have no Jurisdiction.

UPON a *Certiorari* a Conviction before two Justices for cutting down several Lime-Trees in the * Night-Time, being removed into *B. R.* the Defendant offered to plead, that he had § a Title to the Trees, but three of the Judges would not admit the Plea; for if the Justices had no Jurisdiction, as they had not, if Property had been the Question before them, then an Action lies against those Justices, and against him who executes their Order; but if they had Jurisdiction, then *B. R.* hath not Power to question their Judgment, therefore this would be altogether new, and without Precedent. But *Holt Ch. Just.* held, that *St. John's Case* was a Precedent; and though the Roll could not be found, yet it was and must have been done so in that Case, otherwise the Point could not have come in Question; that 'tis as reasonable to falsify the Proceedings of the Justices by this Plea, as 'tis by Action to be brought against them; that if *B. R.* confirms this Order, then no Action will lie against him who executes it, because

Justification.

because he Acts by the Authority of this Court, and that there could be no Reason for him to give an Authority and aid a *Fiat* to a Thing which ought not to be done: But this Conviction was set aside for another Reason (*viz.*) because the *Number and Nature of the Trees* were not expressed: As to the Objection, that they were so small they could not be numbered; the Answer was, if they cannot be numbered, then it ought to set forth so many *Bundles, Faggots or Loads*, for the Number or Quantity ought to be certain in this Case, as well as in an Action of Trespas, because that is to be the Measure of the Damages; and if that had been done, then this Conviction would have been a good Plea in Bar to an Action of Trespas for the same Cutting.

* Justification.

MATTER of *Justification* can never be given in Evidence, but where it cannot be *pleaded*; therefore in *Trespas* upon Not guilty pleaded, *son assault demesne* cannot be given in Evidence; but 'tis otherwise in an *Indictment for Murder, &c.*

* P. 218

(1)
Matter of Justification cannot be given in Evidence, but where it cannot be pleaded.

In Trespas for entering his Close, treading down his Grass, and *feeding his Cattle there*; the Defendant pleads, that *W. R. had Common there*, and appointed him (the Defendant) to look after his Cattle, and that he entered to see them, *quæ est eadem transgressio*, and upon Demurrer to this Plea, it was adjudged ill; for the Defendant justified his Entry only, and not the *Feeding*, and a Man cannot *justify* a Trespas unless he *confess* it; but here the Defendant did not confess it, therefore the Plea being entire, the Justification is bad for the Whole.

(2)
1 Saund. 27. Where a Man cannot justify a Trespas, unless he confess it.

In Trespas for an *Affault, Beating, and Wounding*, and *Evil Entreating*; the Defendant as to the *Wounding* pleads Not guilty, and as to the Residue, that being *Churchwardens*, the Plaintiff sat in the Church with his Hat on his Head, and they pulled it off, *quæ est eadem insultus, verberatio & maletractatio*; this was adjudged no *Justification*, because nothing was said as to the *Beating, tamen quære*, for *Trespas to the Person* imports a *Beating*, but it seems rather to be an *Affault*:

(3)
1 Saund. 14. The Justification must go to the whole.

Trespas quare vi & armis he assaulted and beat the Plaintiff, and *took and imprisoned* him; the Defendant as to the *Force, Assaulting and Beating*, pleads Not guilty, as to the Taking and Imprisoning him he *justifies* under a *Process* to arrest him: This was adjudged ill, because repugnant, for the Defendant having denied any *Affault and Battery*, afterwards confesses it, by justifying the Taking.

(4)
2 Lutw. 932. Where the Justification is repugnant.

Trespas for Beating his Servant *per quod servitium amisit*; the Defendant justifies the *Battery*, but said nothing as to the *Loss of the Service*; and upon a Demurrer to the Plea it was insisted, that was the Principal Matter to which the Defendant had not given any Answer. *Sed per Curiam*, the Loss of the Service is the Consequence of the *Battery*, and that being justified, is a sufficient Answer to the Rest.

(5)
1 Roll. Rep. 331. Justification to Part, good.

* Swinsted *versus* Smith. Mich. 8 Will. 3. B. R.

* P. 219

THIS Case is reported in † 1 Salk. by the Name of *Swinstead versus Lyddall*. It was an Action of *Trespas* for an *Affault, Battery, and false Imprisonment* and for keeping and detaining the Plaintiff, *quousq; he paid the Defendant 11 s.* The Defendant justified under an *Order of the Court of Conscience, &c.* by Virtue whereof he took and imprisoned the Plaintiff, and detained him until he paid 10 s. 4 d. &c. And upon a Demurrer to this Plea it was objected, that it did not answer the Declaration, for that was for detaining the Plaintiff, *quousq; he paid 11 s.* and the Plea is, that he detained him, *quousq; he paid 10 s. 4 d.* so where a Man declares in an Action of Trespas for taking *eleven Sheep*, 'tis no answer to justify the Taking *ten of them*; so likewise if the Plaintiff declare for falsely imprisoning him for *three Days*, 'tis no Answer to justify for *two Days*:

(6)
† 1 Salk. 408. Justification where 'tis good for Part.

Justification.

Days : But on the other Side it was argued, that the *Gift* of this *Action* was for the false *Imprisonment*, as in *Trespas* for Taking his Horse and *immoderately Riding him*; the Defendant justified the *Taking* by the Plaintiff's Leave, but said nothing to the *Riding*; and upon a Demurrer that was adjudged a good Plea, because the *Gift* of the *Action* was the *Taking* the Horse, and the immoderate *Riding* was only an Aggravation of the *Trespas*, and this was *Bringlo* and *Morris's Case*, *Hill. 27 & 28 Car. 2. B. R. Et per Holt Ch. Just.* in the principal Case; the *quousq;* is only an Aggravation, for the *Action* was not brought for *Taking the 11 s.* but for the false *Imprisonment* and *detaining the Plaintiff quousq;* &c. as in *Trespas* for Taking three Sheep, every Sheep is the Cause of the *Action*, (*viz.*) Part of the Cause, and so for imprisoning the Plaintiff for *three Days*, and therefore the Taking every Sheep and imprisoning for every Part of the Time must be answered; 'tis true, if the Plaintiff had been to pay 10 s. 4 d. only, and that after it was paid, the Defendant detained him till he had paid 8 d. more, that might have been material, but then the Plaintiff should have set forth this Matter in * a Replication; so this was adjudged a good Plea.

* Moor 704. 2 Saund. 5. Sid. 472.

Sheppard *versus* Tailour.

(7)
Justification under a Judgment in a Court-Baron, ill.

* P. 220

IN *Replevin* for Taking *six Dishes*, the Defendant justified under a Judgment in a *Court-Baron*, and a *Levari facias* awarded, by Virtue whereof he took the *Dishes*, and upon a Demurrer to this Plea it was adjudged to be ill, because the Execution upon a Judgment in a *Court-Baron* ought to be by *Distingas*, * and not by *Levari facias*, unless there is a special Custom to warrant it; besides, the Defendant should not have begun his Plea with the Judgment, but should have gone on gradually, (*viz.*) he should have shewn that there was a *Plaint* levied, &c. and *taliter processum fuit superinde*, that a Judgment was obtained, &c.

Freeman *versus* Blewitt. Hill. 12 Will. 3. 1 Ld. Raym. 632. S. C.

(8)
1 Salk 409. Where any Officer justifies under a returnable Writ, he must shew that the Writ was returned.

RULED *per Holt Ch. Just.* in this Case, to which the Court agreed, that in *Trespas*, if the Sheriff or other principal Officer justifies by Virtue of a *Capias* or any returnable Writ, he must shew that the Writ was returned, but not if he justifies under a *Replevin* or an *alias Replevin*, for these are not returnable Writs, but a *Pluries Replevin* is returnable; for the Writ commands the Sheriff to replevy the Goods, *vel causam nobis significare*, therefore he must return the Writ, otherwise this Inconvenience might happen, (*viz.*) that if the Defendant should appear and be *Nonfuit* (for he is the first Actor) the Court would be at a Loss how to give Judgment, whether *pro retorn' habenda'*, or a *Capias* in *Witbernam*, or a mere *Nonfuit*.

Searle *versus* Bunnion.

(9)
2 Mod. 70. Where a Man may justify on his Possession without shewing a Title.

* Yelv. 75. Cro. Car. 138. 3 Mod. 132. Lutw. 1492.

IN *Trespas*, &c. The Defendant pleaded, that he was *possessed* of the *Locus in quo*, &c. and so justified the Taking the Cattle *Damage-feasant*; and upon a Demurrer to this Plea it was objected that it was ill, because 'tis not sufficient for him to say generally, that he was *possessed*, &c. for in pleading he ought to shew the Commencement of his Term: *Sed per Curiam*, where *Trespas* is brought, and the Defendant will justify by Virtue of any * *particular Estate*, there he must shew the Commencement of such Estate or Title, but where the Matter of Justification is collateral to the Title to the Land, (*viz.*) where the Title can never come in Question; there such a Justification as in the principal Case, is good.

Laws.

* P. 221

THE Saxon Laws were all unwritten; till *Ethelred* the first Christian King published them in Writing. (1)
Rel. Spelm. 8.

And those Laws had a Mixture of the *British Customs*, and the *Danish Laws* had a Mixture of both; but *William*, called the Conqueror, made a new Model of them, for some he approved and some he rejected, and added more, of which there was a Copy in *Rowland Abby*, under this Title, *ce's sont leges & les Customs que le Roy William Grantôist à tout le peuple de Angleterre apres le Conquest de la terre icy, &c.* (2)
Seld. on Fortescue, Cap. 17. Par. 7.

Mr. *Seldon* tells us, that the *Roman Laws* were in Use in *Britain*, for they had several *Colonies* here, and each of these *Colonies* was governed according to the *Roman Laws*, but compares them to a Ship, which by long and frequent mending hath nothing left of the first Materials of which it was made. (3)

And as to that Question, when and how began our Common Law, he tells us 'tis a trivial Question, and that it began as the Laws of all other States, (*viz.*) when there first began to be a State in the Land. (4)

Laws are divided into *Arbitrary or natural Laws*, the last of which are essentially just and good, and bind every where and in all Places where they are observed. (5)

Arbitrary Laws are either concerning such Matter as is in itself morally indifferent, in which Case both the Law and the Matter and subject of it is likewise indifferent, or concerning the natural Law itself, and the regulating thereof. (6)

Now all *arbitrary Laws* are founded in Convenience, and depend upon the Authority of the legislative Power which appoints them, and both are for maintaining publick Order. (7)

Those which are *natural Laws* are from God, but those which are arbitrary are properly humane and positive Institutions. (8)

Upon the Whole, we may consider the World as one universal Society, and then that Law by which Nations are governed, * is called *Jus gentium*, if we consider the World as made up of *Particular Nations*; then the Law which regulates the publick Order and Right of Men is called *Jus publicum*; and that Law which regulates the private Right of Men is called *Jus civile*. (9)
* P 222

Lease at Will.

Layton versus Feild. Hill. 13 Will. 3. B. R.

PER Holt Ch. Just. Where a Lease is made at Will, the Lessee, after a Quarter of a Year is commenced, may determine his Will, but then he must pay that Quarter's Rent; and if the Lessor determine his Will after the Commencement of a Quarter, he shall lose his Rent for that Quarter: But if a Lease be made from Year to Year, *quamdiu ambabus partibus placuerit*, in such Case after a Year is commenced, neither the Lessor or the Lessee can determine their Wills for that Year because they have willed the Estate certain for so long Time. (1)
Lessee at Will cannot determine his Will after a Quarter of a Year commenced, without Paying that Quarter's Rent.

Legacy

Germaine *versus* Orchard. Trin. 6 Will. 3.

(2)
1 Salk. 346. Lessee for Years grants the Lands to W. R. habend. to him and his Executors after the Death of K. K. the Lessor and his Wife, his whole Interest passed.

* P. 223

(3)
Difference where there is an Authority, and where an Interest.

THE Case was, *Lessee for Years* of Lands granted the said Lands to W. R. his Executors, Administrators and Assigns, *Habendum* to him and to his Executors, &c. after the Death of the Grantor and his Wife; adjudged, that by the *Grant of the Lands* generally, the Grantee is Tenant only at Will to the Grantor, that being Estate enough to satisfy the Grant; for it doth not appear that by a Grant of the Lands the Grantor intended to pass his whole Interest and Term; but this Judgment was reversed in the Exchequer-Chamber, and there it was held, that if A. is possessed of Black-acre for a Term of Years, and grants it to W. R. (not saying, and to his Executors, nor for what Term and Interest) in such Case W. R. is only Tenant at Will to the Grantor; but if he devise Black-acre * to W. R. the whole Estate passeth; for if it should be an Estate at Will, it would either never begin, or determine as soon as it begins.

Anonymous. Pasch. 4 Annæ. B. R.

PER Curiam, obiter, it was held, that a Grant or Authority to come upon my Lands, and to hunt there, is but a *Licence* and no more, but if 'tis to take the Profits, 'tis a Lease at Will; so if 'tis to take the Profits for a Year, 'tis a Lease for a Year, for this passes an Interest, the other is only an Authority to do particular Acts.

Legacy.

(1)
Legacy is suable in Spiritual Court.

(2)
Sid. 44. Where 'tis payable out of Lands, the Remedy is in Chancery.

(3)
Where an Executor is not bound to pay a Legacy.

1 Ch. Rep. 257.

* P. 224

(4)
1 Ch. Rep. 198.

(5)
Moor 713.

THE Cognisance of a Legacy properly belongs to the Spiritual Courts, for such Bequests were not good at Common Law, the Rule being *post mortem tunc tua non sunt*.

But this must be understood where a Legacy is devised generally; but if 'tis payable out of the Land, or out of the Profits of the Land, an Action of the Case lies at Common Law, but the usual Remedy is in Chancery.

The Testator being possessed of several Leases, devised them to his Wife for Life, Remainder to his Son for Life, and he owing several Debts, the Wife paid as far as the Goods and personal Chattels went, and assented to the Legacy and died, there being several Debts still unpaid; then her Executor articles with those Creditors to convey a Lease to them, and they exhibit a Bill in Equity against the Executor and the Son, to have a Conveyance, and the Lord-Keeper Finch decreed a Conveyance; for first, an Executor is not bound to pay a Legacy unless he hath Security given to refund, if there are Debts; and the Reason is, because a Legacy is not due till the Debts are paid, for a Man must be Just before he is Charitable; and therefore, if a Legacy is paid, it remains still in the Hands of the Legatee as a Legacy; but if the Legatee alien *bona fide*, the Creditor is defeated, for he had a Title, and the * Purchaser shall not be prejudiced by this Trust for Creditors: Now in the Principal Case, an Assent to a Legacy will not do any more than an actual Payment would have done.

A Sum of Money devised to W. R. to be disposed as the Testator should appoint by a *Private Note*; now if there was no such Note or Appointment, then 'tis a Legacy to W. R. himself.

Legatee of a Term must not plead, that it was devised to him, and that he entered, but that he entered by Assent of the Executor, or *Virtute Legationis*.

Libel.

The King *versus* Alme & Nott. Trin. 41 Will. 3. B. R.

INDICTMENT for a Libel against several Subjects, &c. to the Jury, unknown. *Et per Curiam*, where a Writing which inveighs against Mankind in General, or against a particular Order of Men; as for Instance, Men of the Gown, this is no Libel, but it must descend to Particulars and Individuals to make it a Libel. (1) What shall make a Libel, what not. 2 Wilfon 403.

The Queen *versus* Drake. Mich. 5 Annæ B. R.

INFORMATION against the Defendant, setting forth, that he being evilly disposed, &c. did make a Libel intitled *Mercurius*, containing divers scandalous Matters *secundum tenorem sequen*, and so set forth some Paragraphs, and in one of them there was the Word *Nec* instead of *Non*, so that it was not literally the same as in the Libel; however it did not alter the Sense; but upon Not guilty pleaded, this Variance being perceived * at the Trial, the Counsel for the Defendant insisted, that it might be found Specially, which was done; and afterwards, upon arguing this Special Verdict, Judgment was given for the Defendant: It was objected against him, that this Variance was immaterial, and that in every Action for Words the Plaintiff usually declares, for Speaking *hec Anglicana verba sequentia*; but 'tis not necessary to prove every Word; therefore to make every literal Omission or Variation fatal, would be to make this Action impracticable. But *per Curiam*, the *Tenor is the Transcript Copy of some Original, to which it may be compared, and therefore there can be no Tenor of Words spoken, because there is no Written Original; but there may be a Tenor of a Writing, which Word always imports a true Copy of the Thing written, and consists in Identity. *Et per Holt Ch. Just.* A Libel may be described either by the Sense, or by the Words; and therefore an Information charging, that the Defendant made a Writing, containing such Words, is good, and in such Case a nice Exactness is not required, because 'tis only a Description of the Sense and Substance of the Libel. But an Information, charging the Defendant with making a Writing *secundum tenorem sequentem*, there the Written Libel, and that set forth in the Information, must exactly agree, because every Word in the Information is a Mark of Description of the very Libel itself; so in Trespass, *Quare clausum fregit*, &c. if the Plaintiff sets forth the But-talls and Boundaries of his Close, and fails in the Proof thereof, he cannot recover; because he is obliged to prove his Description; and there is no Difference between Wrongs done by Words and by Things. (2) 1 Salk. 660. Information for a Libel differing in one Word from the Libel itself, not good. * P. 225

Words are transient, and vanish in the Air as soon as spoken, and there can be no Tenor of them, as hath been already observed, and therefore an Identity is not required, and though the Jury find some Omissions, it will be sufficient, if some be proved, and in such Case the Plaintiff shall recover; but when a Thing is Written, though every Omission of a Letter may not make a Variance, yet if such Omission makes a Word of another Signification, 'tis fatal. (3) Dyer 203. 3 Cro. 503. 2 Cro. 407. Hob. 129. Yelv. 46, 152. 5 Rep. 53. Cro. Car. 328. 2 Saund. 121. Co. Ent. 508.

Cropp *versus* Tilney. Mich. 5 Will. 3. B. R.

UPON a Writ of Error on a Judgment in an Action on the Case, wherein the Plaintiff declared, that he stood to be elected for a Member of Parliament, and that the Defendant caused a Libel to be printed of him with these Words, as spoken by the Plaintiff (*viz.*) *There is a War with France, of which I can see no End, unless the Young Gentleman on the other Side of the Water (innuendo the Prince of Wales) be restored, per quod*, he lost his Election, *ad damnum*, &c. there was a Verdict for the Plaintiff, and Judgment in C. B. and now, upon a Writ of Error in B. R. it was insisted, that an *Innuendo cannot beger an Action, nor make that certain which was uncertain before, and that here was (4) Innuendo, where good. * P. 226

Limitation of Action.

no Scandal; and if so, this was not a *Libel*. *Sed per Holt Ch. Just.* scandalous Matter is not necessary to make a *Libel*, 'tis enough, if the Defendant induces an ill Opinion to be had of the Plaintiff, or to make him contemptible and ridiculous; as for Instance, an Action was brought by the Husband for Riding *Skimmington*, and adjudged that it lay, because it made him ridiculous, and exposed him. Every Man understands who is meant by the *Young Gentleman* on the other Side the Water; if Words are False, the Defendant may justify in an Action, but not in an *Indictment*.

The King *versus* Bear. Hill. 10 Will. 3. 1 Ld. Raym. 414. S. C.

(5)
2 Salk. 417.

* Antea 2. S. P.

INDICTMENT for Making, Writing, Composing and Collecting several *Libels*, in uno quorum continetur inter alia juxta tenorem et ad effectum sequen', &c. after a Verdict this was held good, for *juxta tenorem* imports the same Words; for * *Tenor* is a Transcript, which it cannot be if it differs from the *Libel*; if it had been *ad effectum sequen'*, it would not do, for that might import an *Identity* in Sense, but not in Words.

* P. 227

* **Limitation of Action.** See Evidence 5.

Collins *versus* Denning. Hill. 12 Will. 3. B. R.

(1)
Where Non Assumpsit infra sex Annos, is a good Plea.

ASSUMPSIT, in which the Plaintiff declared, that the Defendant being indebted to him (the Plaintiff) in 20 l. promised to pay it upon Demand, and that he (the Plaintiff) had on such a Day and Place demanded it, but the Defendant refused to pay it; the Defendant pleaded *Non Assumpsit infra sex Annos*, &c. and upon a Demurter to this Plea it was insisted, that it was ill, for it should not be *Non Assumpsit* but *Actio non accrevit infra sex Annos*, &c. because the Duty arises from the Demand and not from the Promise: But this Objection was not allowed, for Payment upon Demand is no more than what is implied by Law.

Ewers *versus* Jones. Mich. 2 Annæ. 2 Ld. Raym. 934. S. C.
Comyns. 137. S. C.

(2)
6 Mod. 25. S. C.
Statute not well pleaded.

LIBEL in the Admiralty by the Seamen against the Owners for Wages, the Defendants pleaded the Statute of Limitations (*viz.*) *That it appeared by the Libel*, that no Suit was prosecuted for this Matter within six Years, whereas they should have pleaded directly, that no Suit had been brought within six Years after the Cause of Action accrued; and if the Statute had been rightly pleaded, it would have been a good Bar; for *per Holt Ch. Just.* though the Statute doth not extend to *Causes maritime*, spiritual, or equitable, but only to *Duties at Common Law*, yet Mariners Wages are a Duty at *Common Law*, and if sued for at *Common Law*, the Statute would have been a good Bar.

Hide *versus* Partridge. Pasch. 1 Annæ. 2 Ld. Raym. 1204. S. C.

(3)
2 Salk. 424. S. C. Whether the Statute extends to Mariners Wages.
* P. 228

UPON a Motion for a Prohibition to the Admiralty, suggesting a Contract at Land, and a Suit for Wages thereon by the Mariners against the Owners, upon an outward * bound Voyage, and that he had pleaded the Statute of Limitations in that Court, which Plea was rejected, for that the Statute did not extend to *Causes maritime*, &c. and that it was no Plea in Bar to a *Trust* or to a *Legacy*; and now it was insisted for the Prohibition, that the Common Law had a proper Jurisdiction for Mariners Wages, and that the Suit might be as well brought for such Wages in the Courts of Common Law as in the Admiralty, so that the Admiralty had at most but a concurrent Jurisdiction in this Case with the Courts of Common Law, and that only by Indulgence of Law, which ought not to be extended so far as to suffer them to proceed in the Admiralty, otherwise

Mandamus.

wife than they might at Common Law: *Et per Holt Ch. Just.* it is a Question among Merchants, whether Mariners Wages were due for outward-bound Ships: But *per Powel Just.* whether they are due or not, is a Question properly determinable in the Admiralty; and he questioned whether the Statute could be pleaded to a Suit in the *Spiritual Court for laying violent Hands on a Clerk*; and *per Holt Ch. Just.* clearly it would be no Plea in that Case, no more than it would be to an Indictment at Common Law, for that is a Prosecution of a publick Nature, *pro reformatione morum*, and not a private Action of the Party to have Recompence in Damages, the Rule was for the Plaintiff to take a Prohibition, and to declare upon it.

Morse *versus* Braxton. Pasch. 12 Will. 3. B. R.

CASE, &c. in which the Plaintiff laid his Action in *Norfolk*; the Defendant pleaded the Statute of Limitations; the Plaintiff replied an Original taken out in *Suffolk*, upon which they were at Issue, and the Plaintiff had Judgment in C. B. but upon a Writ of Error in B. R. that Judgment was reversed, because an Original in one County cannot maintain an Action in another County.

(4)
An Original in one County cannot maintain an Action in another County.

Scandalum Magnatum is not within the Statute 21 Jac. cap. 16. nor slanderous Words, which are actionable only by Reason of any subsequent Loss or Damage, nor *slandering a Title*, but slanderous Words, which are personal and actionable in themselves, are within the Statute.

(5)
Words which are actionable are not within the Statute.

Where the Plaintiff is *beyond Sea*, his Case is not within the Statute, but if the Defendant is *beyond Sea*, 'tis otherwise.

(6)
Where the Plaintiff is beyond Sea his Case is not within the Statute.

Where an Action is barrable by this Statute, a new Promise will revive it; so 'tis of an Acknowledgment, because that is Evidence of a Promise.

(7)
Where a new Promise will revive the Action.

* A *Latitat* taken out and continued is a good Avoidance of the Statute, for 'tis a Demand.

(8)
* P. 229

Mandamus.

Wilkins *versus* Mitchell. Trin. 10 W. 3. 1 Ld. Raym. 348. S. C.
And see the Note in Ld. Raym. 348. *contra*.

IN an Action of Debt for Rent brought in an inferior Court, the Plaintiff was Nonsuit, whereupon the Defendant had Judgment, but they refusing to execute it, B. R. was moved for a *Mandamus*, but it was denied, because the Defendant had a legal Remedy, (*viz.*) By the Writ *de executione judicii* out of the Chancery.

(1)
Mandamus denied where the Party hath another, and proper Remedy.

The King *versus* Mayor of Dartmouth. Trin. 12 Will. 3.

A *Mandamus* to restore *W. N.* to the Place *servientis ad clavem*, meaning the Serjeant of the Mace, &c. The Return was, that there was no such Office in that Corporation, but that there was an Office *Servientis ad clavam*, to which they prescribe to put in and out an Officer at pleasure, &c.

(2)
Mandamus to restore a Serjeant ad Clavem, instead of Clavam.

The King *versus* Mayor of Andover. Trin. 12 Will. 3.

MANDAMUS to restore him to the Place of an Alderman in *Andover*; the Return was, that he was so Poor that he could not pay the Taxes; *Et per Holt Ch. Just.* Where a Man through Poverty cannot pay his *Scot and Lot*, 'tis fit to deprive him of his Magistracy, but not of Liberty; so a *Mandamus* was denied.

(3)
2 Salk. 433. It will not lie to restore a poor Alderman.

Lee

Mandamus.

* P. 230

(4)
3 Mod. 332. Not granted to restore a Proctor in Drs. Commons.

Lee *versus* Oxenden. Trin. 3 Will. 3. B. R.

LEE suggesting that he was *debite juratus & admissus in loco & officio* of a Proctor, &c. and also that he was displaced and amoved from his said Office, prayed a Mandamus to be restored, and insisted, that he had a Freehold in his Office, and that it concerned the Administration of Justice, but the Mandamus was denied, because this Matter was merely spiritual, and B. R. cannot take Notice of it, nor correct Errors in their Proceedings, in Cases where they have a proper Jurisdiction and Cognizance; so that this being of an Ecclesiastical Nature, and the Deprivation being a Judicial Act, it cannot be avoided but by Appeal.

The King *versus* Mayor of Chester.

(5)
5 Mod. Mandamus to restore nine Persons jointly, quashed for that Reason. 2 Salk. 433. S. P.

A Mandamus was granted to restore Brett and eight other Persons to the Place of Common Council Men of Chester; the Mayor made a bad Return, however, the Court quashed the Mandamus, being joint for nine Persons, when they had several Offices and Interests, and ought to have several Writs of Mandamus.

The Queen *versus* Cory. Mich. 8 Will. 3.

(6)
Where not granted without an Affidavit of the Fact.

THE Court was moved for a Mandamus to the Justices of Peace, for that they proceeded to remove W. R. from his Place of Abode, after he had offered to give Security to indemnify the Parish - *Et per Holt Ch. Just.* In a Matter of Right, as for Instance, where a Mandamus is prayed to restore a Man, &c. we never require an Affidavit of the Fact, but this is required upon a supposed Failure of Duty in the Justices, and therefore denied to grant a Mandamus till Affidavit made, &c.

King and Queen *versus* Dr. Gower. Trin. 1694. B. R.

(7)
Mandamus will not lie to turn out a Fellow of a College.

* P. 231

A Special Mandamus was directed to Dr. Gower, &c. reciting, that such particular Fellows of his College had not taken the Oaths, so that their Fellowships were void by the Statute 1 Will. 3. and requiring him to turn them out, and to place new Fellows in their Room; the Return was of several Statutes, one of which was, that no one shall lose his Freehold * without being heard and admitted to answer the Charge, and that the Persons named in this Mandamus were duly elected, &c. and that *non constat*, &c. but they had taken the Oaths: *Et per Curiam*, as to this last Part of the Return, 'tis ill, because the Oaths are to be taken before the Master and Fellows; but the chief Question was, whether a Mandamus would lie in this Case, and in this Manner, and the Court inclined, that it would not, because the Fellows who are to be turned out, are no Parties to this Writ, so that they would be displaced without being heard, and without Answer; and this differs from the Common Cases of Mandamus, which are usually to restore Men to their Rights, and are directed to them by whom the Injury is done; and tho' it may happen, that even in such Case a Man may be turned out of his Place, yet that is collateral, and not by command of the Writ.

The King *versus* Taylor.

(8)
Mandamus, to whom to be directed, and where the Return was ill, and where the Cause of Removal was Just.

MANDAMUS to restore him to his Place of Alderman of the City of Gloucester; the Return was made by the Mayor and Bailiffs, (*viz*) they returned their Power, &c. and that Taylor was removed by thirty of the Common Council-men in the Council-Chamber assembled, for that he was a Common Drunkard, *Et per Curiam*, This Return was adjudged ill, because it did not appear, that the thirty Common Council-men were then and there assembled as a Common Council, for they might be there to Feast, or to other Purposes.

But that the Cause returned was sufficient to remove him, 'tis true, if a Man is Drunk by Accident, that would not be Cause to remove him; but habitual Drunkenness makes a Man unworthy to be a Magistrate, and disables him in Point of Government.

Mandamus.

Tho' the Removal was by the Mayor and thirty of the Common Council-men, yet the Writ ought not to be directed to them, but to the Corporation by its proper Name, as it was in this Case to the *Mayor and Bailiffs*.

But the Return being ill for the Reason before mentioned, a Writ of Restitution was granted: and afterwards the Question was, whether the Corporation might proceed against him *de novo* for his Drunkenness? and the Court held they might. 1 Roll. Rep. 409. 3 Bullst. 189.

The King *versus* White. Trin. 2 Annæ.

* P. 232

MANDAMUS to restore him to his Place of Clerk to the Butchers Company in London, it being a Charter-Office; but *per Curiam*, it was denied, for if 'tis an Office of Freehold, he may have an Assise, if 'tis not an Office of Freehold, then 'tis only a Private Service, which doth not concern the Publick. (9) Denied to restore a Clerk of a Company in London.

The Queen *versus* Inhabitants of Littleport. Hill. 2 Annæ.

THIS Case is reported in 2 Salk. by the Name of *Tawney's Case*, it was thus, *ff. A Mandamus* to the Churchwardens and Overseers of the Poor of the Parish of Littleport, to make a Rate to reimburse the old Overseer of the Poor what Money he had laid out, of his own, for Relief of the Poor: The Return was, that the major Part of the Parishioners did not agree to his Accompt; and the Question was, whether the Plaintiff *Tawney*, being a former Overseer, but now out of his Office, should have a *Mandamus* to the present Overseers to make a Rate to reimburse the Money he laid out, of his own, to relieve the Poor? It was insisted in his Behalf, that he should have a *Mandamus*, because he was indictable for not relieving the Poor, though he had none of the Parish Money in his Hands, and he might die in his Office, therefore it seems reasonable, that the Law should give him some Remedy, since it subjects him to this Charge. But *per Curiam*, The Law doth not oblige him to lay out his own Money to relieve the Poor; but he is to make a Rate, and this is to be allowed by the Justices, and the Poor are to be relieved out of this Money when raised; otherwise the Consequence would be, that Overseers of the Poor would lay out what Money they pleased, and Charge the Parish with it; so that what he did in this Case was voluntary, being in no wise compellable to do it, and therefore it would be unreasonable in this Court to compel the succeeding Overseers to reimburse him; he should either have kept his own Money, or taken Care to have a Rate made, and that would have been his proper Method; and this Court never allows a *Mandamus* where the Law hath provided another Remedy, and a Rate cannot be made as for him, but to relieve the Poor. (10) 2 Salk. 531. Mod. Cases 97. Mandamus to the present Overseers to make a Rate to reimburse the old ones.

* The Queen *versus* Sir Richard Raines. Mich. 6 Annæ.

* P. 233

THERE is a Case reported by this Name in 1 Salk. but 'tis not the same Case, nor in the same Term, but four Years after. *ff. Mandamus* to admit her to the Probate of a Will by which she was Executrix; the Return was that she was made Executrix *durante minore ætate* of W. R. and that the said W. R. was now of full Age, so that the Testator remained Intestate. *Et per Holt Ch. Just.* He should have returned generally, that she was not Executrix; or if he would return the Special Matter, as he hath done, he should have averred, that she was not Executrix *aliter vel alio modo*; but that the Return now made was not a direct Answer to the Writ, but only Argumentative, to shew that she was not Executrix. But the Court would not grant a *peremptory Mandamus*; they quashed this for the Insufficiency of the Return, and amerced the Defendant, and ordered an *alias Mandamus*, that the Suggestion of the Writ might be fully and plainly answered. (11) 1 Salk. 229. Mich. 10 W. Mandamus to admit one to the Probate of a Will.

Though the Return is insufficient, yet if it appear thereby that the Party ought not to be restored, he shall not be restored. (12) Sid. 14.

Where the Place is of mere Service, no *Mandamus* will lie; as for an *Usher* of a School; but where 'tis an Office, as Churchwarden, Sexton, Steward of a Court, (13) Sid. 457. Sid. 69, 152.

Master and Servant.

Sid. 169.
3 Mod. 332.

Court, &c. a *Mandamus* will lie; and so it will to restore an *Attorney* to his Place of *Attorney* in an *Inferior Court*, and to restore the *Treasurer* of the *New-River-Water*; but it will not lie to restore a *Proctor* of the *Spiritual Court*.

(14)
1 Lev. 14.
1 Wilfon 206.

A *Fellow of New College* was expelled by the *Warden*, &c. whose Sentence was confirmed by the *Visitor*; and this being returned on a *Mandamus*, it was objected, that the Cause of his Expulsion did not appear. *Sed per Curiam*, this being a private *Eleemosinary Society*, and a *Visitor* appointed by the *Founder*, no *Mandamus* lies; and therefore 'tis to no Purpose to object against the Return. *Bagg's Case* was the first *Mandamus* of this Sort; as for those mentioned in *Ryley* they are no more than *Letters Recommendatory*.

(15)
2 Lev. 18.

Mandamus lies to restore a *Sexton* upon a Certificate, that he is an *Officer* for Life, and had so much of every House in the *Parish* for Wages.

(16)
1 Vent. 302.
* P. 234

* *Mandamus* to restore a *Common Council-man*; the Return was, that he said *Alderman W. R. was a Knave*; disallowed, for the Words have no Reference to the *Corporation*: It was held by my Lord *Hale*, that Returns of this Nature ought to be sworn, and that it was so done in *Meddlicott's Case*; but of late it was disused.

Master and Servant.

Sir Robert Wayland's Case.

(1)
Where the Master is liable for the Cheat of his Servant.

1 Roll. 94, 95.

HE used to give his Servant Money every *Saturday* to defray the Charges of the foregoing Week, the Servant kept the Money, yet *per Holt Chief Justice*, the Master is chargeable, for the Master at his Peril ought to take Care what Servant he employs; and 'tis more reasonable, that he should suffer for the Cheats of his Servant than Strangers and Tradesmen; so if a *Smith's Man* pricks my Horse, the Master is liable.

Boulton versus Arliden. Pasch. 9 Will. 3. B. R. at the Sittings at Guildhall, coram Holt Chief Justice.

(2)
1 Ld. Raymond 224.
Where the Master is not liable for his Servant.
See 1 Wilfon 328.

IN this Case it was held, that where a Servant usually buys for his Master upon *Tick*, and takes up Things in his Master's Name, but for his own Use, that the Master is liable, but 'tis not so where the Master usually gave him Ready Money.

That where the Master gives the Servant Money to buy Goods for him, and he converts the Money to his own Use, and buys the Goods upon *Tick*, yet the Master is liable, so as the Goods come to his Use, otherwise not.

* P. 235

* That a Note under the Hand of an Apprentice shall bind his Master, where he is allowed to deliver out Notes, though the Money is never applied to the Master's Use.

But where he is not allowed or accustomed to deliver out Notes, there his Note shall not bind the Master, unless the Money is applied to the Master's Use.

(3)
Ch. Rep. 25. Where a Factor of the East-India Company shall have the Benefit of what he saved, and which the Company ought to have paid.

A Factor of the *East-India Company* carried over 1200*l.* in Gold to *India*, where a *Custom* was due for it, but saved by the Factor and never paid: *Et per Curiam*, the Factor shall have the Benefit of it, and not the *East-India Company*, for it was due from them and ought to have been paid; therefore they cannot make a Title to it against one who hath the Possession, for that is sufficient against all Persons but against him who hath the very Right, and the Non-payment in this Case was at the Peril of the Factor.

Miscasting. See Money.

Misnomer.

Lepara versus Sir John Jermaine. Pasch. 1 Annæ.

THE Defendant was sued by the Name of *John Jermaine, Knight*; he pleaded in *Abatement*, that he was a *Knight and Baronet*; the Plaintiff replied, that he (the Defendant) was a *Knight* only; but the Plaintiff perceiving his Mistake, and the Proceedings being all in Paper, he played * Leave to amend, but it was denied, because there was nothing to amend by, for the Bill and Process was by the Name of *Knight*; then the Question was, whether *Baronet* was such a necessary Part of his Name as the Action must abate for Want of it: *Et per Holt Ch. Just.* *Baronet* is as an essential Part of his Name as *Knight*, because 'tis a *Dignity*, and whether 'tis created by Act of Parliament or by Letters Patents, 'tis Part of his Name, as *Duke, Viscount, Marquis, Baron*, though as to this last Name of Dignity, there is a Difference between a *Baron by Tenure* and a *Baron by Patent*, for in the first Case, *Baron* is not a Name of Dignity; and if 'tis omitted it shall not abate the Action, but a *Baron by Letters Patents* is a *Dignity*, and Part of his Name.

(1)
1 Salk. 50. S. C. Baronet is a Dignity and Part of his Name. 2 Ld. Raym. 1178.
* P. 236

The King versus Bishop of Chester.

IN a *Quare Impedit*, the Plaintiff claimed under a Grant to Sir *William Sands*, Where the Declaration is who granted to the Lord *Derby*; the Defendant pleaded, that Sir *William* aided by the Verdict, *Sands, non concessit* to the Lord *Derby*, upon which they were at Issue, and the Jury found, that it was granted to the said *William Sands* in the Declaration, by the Name of *William Sands, Esq;* being then an *Esquire*, and afterwards made a *Knight*: *Et per Curiam*, this Declaration is aided by the Verdict, by which the Grant and the Identity of the Person were found; and this Explanation is no more than what is often done by the Plaintiff himself in late Cases, as for Instance, where *W. R.* is bound in a Bond by the Name of *W. R. Esq;* and is afterwards *Knighthood*, the Plaintiff must bring his Writ against him by the Name of *W. R. Knight*, but in his Declaration he must shew the Special Matter, (*viz.*) that the Defendant bound himself by the Name of *W. R. Esq;* and was afterwards *knighthood*; but 'tis otherwise if the Defendant had craved Oyer of the Bond and demurred.

(2)
1 Ld. Raym. 303.

The King versus Bishop of Chester and Peirce.

IN a *Quare Impedit*, the Defendant, as Patron, pleaded a Grant made by King Charles I. to *William Thackston, Armigero, postea militi*, who granted it to the Defendant; the Plaintiff craved Oyer of the Letters Patents, &c. and it appeared to be a Grant to Sir *William Thackston, Knight*, and upon a Demurrer to the Plea, *Rookby Just.* was of Opinion, that this might be the same Person, for he might have such a Name by Reputation: But *per Holt Ch. Just.* a Grant to *William Thackston, Esq;* by the Name of *William Thackston, Knight*, cannot be good, because *Knight* is a Name of Dignity, and Part of * his Name, and as much his Name as the Name of *Baptism*; and if he might have such a reputative Name, he ought to have pleaded it so, (*viz.*) *per nomen, or cognitus & reputatus per nomen, &c.* as in the Case of a *Bastard*; but *Knight* cannot be a Name in Reputation, there is no Foundation for it, as in the Case of a *Bastard*, or the eldest Son of a *Duke*, who by the Laws of Heraldry takes Place as a *Marquis*, but the Title of *Knight* can be only conferred by the King; and in ancient Conveyances the eldest Sons of *Dukes* and *Earls* had only the Addition of *Esq;* commonly called *Marquis, &c.* and now the Course is to make the Addition of *eldest Son* to such Title.

(3)
1 Ld. Raym. 292. 2 Salk. 560. S. C. Knight is a Dignity and Part of his Name.

* P. 237

Misnomer.

College of Physicians *versus* Dr. Salmon. 1 Ld. Raym. 680. S. C.

(4)

5 Mod. 327. 2 Salk. 451.
S. C. Misnomer in the
Name of the Corporation.

DEBT against the Defendant, for *practising Physick without Licence*, in which the Plaintiffs declare by the Name of the President of the College, *seu Communitas* of the Faculty of Physick in London, &c. The Defendant craved Oyer of the Letters Patents, whereby it appeared they were incorporated by the Name of the President, College, *five Communitas* of the Faculty of Physick in London, and were impowered to sue and be sued by the Name of *Presidens Collegii, five Communitatis facultatis medicinae in London*, and then pleaded *Misnomer* in Abatement: *Et per Curiam*, The Plea was adjudged good, for they may sue by their Name of Incorporation, which is President, Collegium, *five Communitas* of the Faculty of Physick, &c. or by the Name given to them for that Purpose, which is *Presidens Collegii, five Communitatis*, &c. but here they sue by neither of those Names, but by the Name of *President of the College, seu Communitas*, &c. so Judgment was given *quod Billa cassetur*.

Afterwards, *Trin. 13 Will. 3. B. R.* another Action was brought by the same Plaintiff against the same Defendant, and for the same Cause; and this was brought in the Name of *President, College, or Commonalty*, which was the true Name of the Incorporation; and upon Demurrer it was objected, that it ought to be brought in the Name of *President of the College*, for by that Name they have Power to sue: *Sed per Curiam*, they may sue by the Name of *Incorporation*, or by the Name of *President* only; but though by their Charter they have Power to sue by that Name; yet *per Holt Ch. Just.* 'tis better (as in this Case) by the Name of their Incorporation.

* P. 238

* Anonymous. Hill. 2 Annæ.

(5)

Traverse of his Name,
where 'tis repugnant.

THE Plaintiff declared against the Defendant by the Name of *John*, the Defendant pleads he was baptized by the Name of *Benjamin*, and traversed, that *ipse idem Johannes* was ever known by the Name of *John*; and upon a general Demurrer to this Plea, *per Holt Ch. Just.* this Traverse is repugnant in itself, and stands but as Matter of Form, yet Pleas in Abatement are not within the Statute of *Eliz.* but only Pleas to the *Right* and to the Merits of the Cause; but though the Traverse was repugnant, 'tis not immaterial, because it waived the precedent Matter, which was pleaded before of Baptism, and was become the Substance of the Plea itself, so that now the Issue must be by what Name the Defendant was called and known, and not by what Name he was baptized; but he might have relied upon his Name of Baptism, and concluded with it, for a Man can have but one Name of Baptism, therefore it implies a Negative of itself, without saying, that he was called or known by no other Name.

Anonymous. Mich. 10 Will. 3.

(6)

Where an Alias dictus is
proper.

THE Obligor was bound by the Name of *W. R.* he may be sued by the Name of *W. R. alias dictus W. C.* if his Name is so; but if his Name is *R. W.* the Obligee cannot sue him by the Name of *S. W. alias dictus R. W.* for he cannot have two Names of Baptism, neither is there any Remedy, unless he hath estopped himself by Appearance.

Knight's Case. Trin. 2 Annæ. 2 Ld. Raym. 1014. S. C.

(7)

1 Salk. 329. Where John
was sued, and he pleaded
in Abatement, that his
Name was Thomas.

ACTION against *John Knight*, the Defendant pleaded in Abatement, that his Name is *Thomas*, and thereupon the Plaintiff commenced a new Action against him by his right Name *Thomas*; the Defendant pleaded in Abatement a former Action depending; and upon a Demurrer to this Plea it was insisted, that the Averment was against the Record, for that *John* and *Thomas* could not be the same Person: *Sed non allocatur*, for in Fact it may be so, the Plaintiff should have

Money. Mortgage.

have confessed the *Misnomer*, and prayed an Abatement of his Writ before he had proceeded to a new one.

* *Allen versus Symonds.*

* P. 239
(8)

CASE, &c. in which the Plaintiff declared against the Defendant by the Name of *Symonds*; the Defendant pleaded in Abatement, that he was known by the Name of *Symms*, *absque hoc*, that he was known by the Name of *Symonds*; the Plaintiff replied, that he (the Defendant) was known as well by the one Name as by the other; and upon a Demurrer to this Replication, *per Holt* Ch. Just. the * Precedents are both Ways; thereupon the Defendant accepted a new Declaration, but without Payment of Costs. * Raft. Ent. 716. Old Ent. 27.

Money.

Dixon versus Willows. Mich. 8 Will. 3.

UPON a Motion in Arrest of Judgment, after a Verdict upon an *Indebitatus Assumpsit* for 13 l. 10 s. for nine Guineas, without saying *ad valorem*: It was held, that the *Broad-Pieces* were in Effect the *first Guineas* coined in England for 20 s. and went at that Rate for some Time; but the Value of Gold rising; these *Broad-Pieces* were made current by Proclamation at 1 l. 1 s. 4 d. and though there was afterwards a second Rise in the Price and Value of Gold, yet there was no Proclamation to raise the Value of these Pieces in Proportion to the Value of Gold. But afterwards, when *Guineas* were coined, they were made in Respect to the Value set upon *Broad-Pieces* by Proclamation, as aforesaid; though there is no Act of Parliament or Order of State for these *Guineas* as they now are taken, yet being coined at the Mint, and having the King's *Insignia* on them, they are lawful Money, and current at the Value they were coined and uttered at the Mint. 2 Salk. 446. S. C. (1)

* *Assumpsit* for several Particulars, amounting in all to 70 l. but by *Miscasting* it was alledged to amount to 90 l. *per Curiam*, should the Jury give above 70 l. the Verdict would be naught, if under 70 l. 'tis good. 1 Lev. 58. (2) * P. 240

Debt for Rent, and the Plaintiff demanded less than due, adjudged ill after a Verdict; the Case was, that the Year's Rent amounted to 60 l. and the Plaintiff declaring for the Arrears for one Year and an Half, demanded 80 l. whereas it came to 90 l. See *Cro. Eliz.* 22. *contra*. 2 Lev. 4. (3)

In Covenant, and a general Demurrer to the Declaration, for that the Plaintiff demanded more than appeared to be due, upon the first Breach, and less upon the second. *Et per Curiam*, the first may be cured by the Plaintiff's Release, or by the Verdict upon the Writ of Inquiry finding less; and as to the second, 'tis well after Verdict, or upon a General Demurrer; but not upon Special Demurrer, and shewing it for Cause. 2 Lev. 57. (4)

Mortgage.

Gory's Case. Hill. 9 Will. 3. in Cancellaria.

DECREED by the Lord Chancellor *Somers*, that where a Mortgagee lends more Money upon Bond to the Mortgagor, he shall not redeem unless he pay the Principal and Interest due on the Bond, as well as on the Mortgage. But if he mortgage the Equity of Redemption to another, the second Mortgagee

(1)

Nobility.

Mortgagee shall not be affected with this Bond, because 'tis but a personal Charge upon the Mortgagor. *Et per Holt Ch. Just.* If a Purchaser pay the Money to the Mortgagee, he (the Mortgagee) is become a Trustee for the Purchaser.

* P. 241

(2)
1 Ch. Rep. 1. Where a Mortgagee cannot have a Remedy to recover his Money, the Mortgagor cannot compel a Redemption.

* One having the Reversion in Fee expectant upon the Determination of a Lease for Life, in an Estate worth 1000 *l. per Annum*, conveys it in Fee to *W. R.* in Consideration of 1000 *l.* and no more, the Tenant for Life dies, and now the Conveyance to *W. R.* is pretended to be no more than a Mortgage, because he had declared, *That he did not know how long he should enjoy the Estate, and that he would take his Money again, with Interest: Sed dubitatur per Curiam*, because *W. R.* had no Remedy to recover his Money; and where a Mortgagee cannot compel the Repayment of his Money, the Mortgagor shall not enforce a Redemption, for the Remedy ought to be reciprocal; and besides, Matter subsequent will not make it a Mortgage, if it was not so upon the original Agreement.

(3)
1 Ch. Rep. 68. Where a Mortgagee assigns, all the Money then due shall be Principal.

Where a Mortgagee assigns the Mortgage, all Money really paid by the Assignee, if due at that Time, shall be accounted Principal as to the Mortgagor, whenever he comes to redeem.

(4)
1 Ch. Rep. 83. Redemption-Money to be paid to the Heir, if no Defect of Assets in the Executor. Postea 7.

When the Heir of the Mortgagee is to reconvey the Estate mortgaged, and there is no Defect of *Assets* in the Hands of the Executor, the Redemption-Money shall be paid to the Heir, if the Condition was to pay it to him; so if it was to pay it to the Mortgagee, his *Heirs or Assigns*; so it is if it was to be paid to his *Heirs or Executors*; but 'tis otherwise, if it was to be paid to the Executors only.

(5)
1 Ch. Rep. 258. Where a Mortgagee shall have Interest for his Interest.

Mortgagee, where the Mortgage is forfeited, shall have Interest for his Interest; and so shall an Assignee, for all Interest due from the Time of the Assignment.

(6)
1 Ch. Rep. 283. Where the Redemption-Money shall be paid to the Heir, and where to the Executor. Antea 5. S. P.

Mortgage to *W. R.* and his Heirs; but that they should reconvey, if the Mortgagor, his Heirs, Executors or Administrators should repay the Principal Sum and Interest to the said *W. R.* his Heirs, Executors, Administrators or Assigns; the Mortgagee died, and the Mortgage being forfeited, the Question was, whether the Heir of the Mortgagee, or his Executors, should have the Redemption-Money, for the Heir was to reconvey, and there was no Defect of Assets in the Executors Hands; and by the Condition it was limited to the Heir as well as to the Executor. Adjudged, that *Equitas sequitur legem* as near as may be; now if the Condition had been to repay, without mentioning to whom, in such Case the Executor should have the Money; because it first came out of the personal Estate; but the * Benefit of Redemption being forfeited in Law, 'tis all one in a Court of Equity, as if neither Heir or Executor had been named; and therefore in that Case Equity will appoint the Executor to have it, because the Right of the Mortgagee was only to the Money, for which the Land was no more than a Security, and as his Right to the Land was in that Respect only, therefore the Money is personal Estate, and must come to the Executor; but where the Condition appoints the Money to be paid either to the Heirs or Executors in the Disjunctive, and the Mortgagee comes at the Day, he hath his Election by Law to pay it to either; and all Mortgages belong to the personal Estate, though made in Fee.

* P. 242

Nobility.

The King *versus* Knollis. Trin. 6 Will. 3. B. R. 1 Ld. Raym. 10. S. C.

(1)
2 Salk. 509. Where Nobility was pleaded in Abatement to the Writ.

THIS Case is reported in 2 Salk. but it was as followeth: The Defendant was indicted by the Name of *Charles Knollis, Esquire, at Hick's Hall*, for Murder, which Indictment being removed into B. R. by *Certiorari* he pleaded in Abatement, that *William Knolls, Viscount Wallingford*, was by Letters

Nobility.

Letters Patent under the Great Seal of *England*, which he produced in Court, created *Earl of Banbury*, to him and the Heirs Males of his Body ; that he died, and that the Honour descended to *Nicholas Knolls* his Son and Heir, who died, and the Honour descended on the Defendant, Son and Heir of the said *Nicholas*. *Et hoc paratus est verificare.* The Attorney-General replied, that the Defendant on such a Day petitioned the Lords in Parliament to be tried by his Peers, and that they upon Consideration thereof, *dismissed his Petition*, and disallowed his Peerage ; and upon a Demurrer to this Replication, these Exceptions were taken to the Plea.

- (1.) Because it doth not conclude *prout patet per Recordum*.
- (2.) That there ought to have been a Writ to certify the Descents.
- * (3.) That the Plea ought to have averred *Banbury* to be in *England*.
- (4.) That the Defendant did not plead, that he was *unus parium Regni Angliæ*. * P. 243
- (5.) That this Plea is avoided by the Replication, that the Defendant was barred of his Peerage by the Order of the House of Lords.

Which Objections were thus answered.

(1.) And first the Court held, that here being Descents pleaded, which are *Matters of Fact*, for that Reason *prout patet per Recordum* would have been a very improper Issue, and that *Earl or no Earl* could not have been an Issue in this Case, but *non concessit* only, because the Letters Patents are set forth upon Record, and therefore they held Nobility in this Case triable *per Pais* ; so where Nobility is gained by Matter of Fact, 'tis triable as aforesaid, as for Instance, where 'tis gained by *Marriage* ; but where 'tis by *Writ* only, or by *Patent*, without Descents, 'tis not triable but by Record, and in such Case the Plea must conclude *prout patet per Recordum*, and so are the * 22 Affize 24. Br. Affize 240.

(2.) As to the second Objection, a *Writ to certify the Descents* is only *cautionary* and not necessary.

(3.) They held, that the Defendant need not aver *Banbury* to be in *England*, for it will be intended that it was ; besides, an *Earldom* consists in *Dignity and Office*, and 'tis not material whether the Place be in *England* or not, as for Instance, there is no such Place as *Rivers*, or *Albemarle* in *England*, and yet there are such *Earls* ; for the Great Seal, which necessarily relates to *England*, makes them *English Peers* ; 'tis true, the King may create an *Irish Peer* under the Great Seal, but that must be by express Words in the Patent.

(4.) The Defendant needs not aver, that he is *unus parium Regni Angliæ*, because he appears to be so by Letters Patents now produced ; and as to that Matter, *Eyre Justice* took this Difference, (*viz.*) where Peerage is claimed * *ratione Baronie*, as by a *Bishop*, he must plead, that he is *unus parium Regni Angliæ*, but * 4 Inst. 15. where the Claim is *ratione nobilitatis*, he needs not plead otherwise, than pursuant to his Creation.

(5.) It was adjudged, that the Order of the House of Lords did not take away the Defendant's Peerage, nor conclude him, because his Cause was not properly before them ; * the Course is where a Man is disturbed in his Title, to Petition the King, who indorses the Petition and sends it into Chancery. * *Stamf. Prær.* 72. 22 Ed. 3. 5. *L. quinto Ed.* 4. 117.

* A personal Honour, as the Dignity of Peerage may be forfeited by Attainder, for 'tis implied by a Condition in Law, that the Person dignified shall be loyal ; and this Dignity after Attainder cannot descend, because the Blood by which it is to descend is corrupted ; such a Dignity cannot be *surrendered*, or *transferred by Fine*, for 'tis a Quality affixed to the Blood, and so merely personal, that a Fine cannot touch it ; besides, if it was permitted, it would draw the Trial of Peer or no Peer into the Court of Common Pleas, which is determinable only in Parliament, (*viz.*) in the House of Peers. (2) The Dignity of Peerage may be forfeited by Attainder, but it cannot be surrendered or transferred by Fine.

Nolle Prosequi.

“ The Serjeant's Observations upon this Title, and upon a *Retraxit*.”

(1)
† Wilson 90. Difference
between a Nonsuit and
Retraxit.

A *Nonsuit* is where the Plaintiff ought to appear but makes Default, but a *Retraxit* is where the Party is in Court and makes Default.

(2)
Nonsuit is never peremp-
tory before Appearance.

A Nonsuit is either before Appearance, at the Return of the Writ, or after, at some Day of *Continuance*, for the Plaintiff is always the first Agent, but 'tis never peremptory before Appearance; 'tis true, after Appearance, and in some Cases, 'tis peremptory, as in *Appeals Quare impedit*, and *Attaints*, &c.

(3)
Where the Nonsuit of
one is the Nonsuit of all.

In *personal Actions*, the Nonsuit of one is the Nonsuit of all the Plaintiffs, except in some Cases, where *Summons and Severance* is allowed; 'tis so in *Trespas*, and 'tis so in Debt, as for Instance, if an Action of Debt is brought against A. B. and C. by several *Præcipe's*, a Nonsuit *quoad A.* is a Nonsuit *quoad* the other two, but 'tis otherwise in a *Discontinuance*.

* P. 245
(4)
See Sid. Blake's Case.

* So where an Action of Debt was brought against three Co-heirs, two of them confessed Assets, and being at Issue with the Third, the Plaintiff was Nonsuit, this shall enure to all.

(5)
* 1 Inst. 139. b.

At Common Law, upon every *Continuance* or Day given, the Plaintiff might be Nonsuit, so that even after a * Verdict, if the Court took Time to consider and be advised, the Plaintiff was demandable and might be Nonsuit; but this is now remedied by the Statute 2 H. 4. yet after a † *Privy Verdict* the Plaintiff may still be *Nonsuit*, and so he may after a *Special Verdict* found, because the Matter was argued, and so he may after a Demurrer, though the Matter was argued, if the Court give a Day over, for the Plaintiff is then demandable.

† Dyer 53.

(6)

As to a *Retraxit* the Rule is, *Qui semel actionem renunciavit amplius repetere non potest*, therefore a *Retraxit* is a Bar to any Action of equal Nature brought for the same Cause or Duty, but a Nonsuit is not.

(7)
8 Rep. 58. in Becher's
Case.

A *Retraxit* must be always in Person, for the Entry is *Venit & fatetur se nolle ulterius prosequi*, and therefore, if 'tis by *Attorney*, 'tis Error.

(8)
† Cro. 551.

Two joint Obligors, one was sued, and as to him a *Retraxit* was entered, and afterwards the Obligee brought an Action of Debt against the other, who pleaded this *Retraxit* in Bar to that Action; and the better Opinion was, that it was a good Bar.

Goddard *versus* Smith. Mich. 3 Annæ.

(9)
2 Salk. 456. Where a Non
prof. is no Discharge.

THERE is a short Note of this Case in 2 Salk. but the Case was as followeth:

J. W. R. being indicted for *Barretry*, the Attorney-General entered a *Non prof.* (viz. *Quod attorn' generalis Dominæ Reginae, ipsum inde non vult ulterius prosequi*, whereupon W. R. brought an Action on the Case against the Prosecutor, for a false and malicious Indictment prosecuted against him (the Plaintiff) *Et quod fuit debito modo inde exoneratus*, and at the Trial gave this *Non prof.* in Evidence: *Sed per Curiam*, it ought to be an *Acquittal upon the Merits of the Cause*, which was never tried in this Case, and there was no Default in the Defendant in not having it tried: *Et per Holt Ch. Just.* This is no Discharge, 'tis only putting the Defendant *sine die*, the Attorney may take out * new Process if he will. *Sed per Harcourt, Clerk of the Crown-Office*, it was never yet done, *Non Pros's* have been frequent upon Informations, but never upon *Indictments*, till the Reign of Car. 2. and the Court thought it hard that the Attorney-General should allow them.

* P. 246

Cree

Notice. Nufance.

Cree *versus* Roll. Pasch. 13 Will. 3.

IN Ejectment against two Defendants; afterwards, at the *Nisi prius*, the Plaintiff entered a *Retraxit* against one of them, and the Cause was tried against the other; adjudged, that before the Record is sent down by *Nisi prius*, either before or after Issue joined, the Plaintiff may enter a *Non Prof.* against one Defendant where they sever in their Pleas, but where they do not sever the Plaintiff cannot enter a *Non Prof.* as to one of them.

(2.) That there cannot be a *Non Prof.* at the Trial at the Assises.

(10)
Where a Non Prof. may be entered, where not.

Notice.

WH E R E a Promise was made to pay the Plaintiff 20 l. upon his Return from *Hamburg*, the Plaintiff must give Notice of his Return, and alledge it specially in his Declaration.

(1)
1 Roll. Rep. 469. contra.
1 Vent. 78. Where special Notice must be given.

Devise to his youngest Daughter in Tail, *provided, that if she marry without the Consent of W. R. then to his second Son in Tail*; the Daughter married without the Consent of *W. R.* and the second Son entered, and both are found to be Infants, and also that the Daughter had no Notice of the Condition: adjudged, this is a conditional Limitation, and that the second Son might enter, and that Want of Notice will not excuse the Daughter, because no one is bound to give her Notice; and as she takes Notice of the Estate devised to her, so she is bound to take Notice of the Condition upon which she takes it; but 'tis otherwise where the Devise is to the Heir at Law upon such a conditional Limitation, because he may enter generally, as Heir, not knowing there was a Will.

(2)
2 Lev. Williams v. Fry.
Where a Person is bound to take Notice of a conditional Limitation.

* Where a Man covenants to make *W. R.* such an Estate in *D.* the Covenanter ought to give Notice to *W. R.* what Manner of Conveyance he intends; that if it be a Feoffment, *W. R.* may be ready on the Land to take Livery and Seisin.

* P. 247
(3)
1 Vent. 447.

So where a Man covenants to levy a Fine to *W. R.* the Covenanter must give Notice whether he intends to levy it in Court, or by *Dedimus*.

(4)
1 Vent. 142.

An Award, that *A.* shall make *B.* a Lease, &c. within six Months following, and that upon making thereof *B.* shall pay the other 50 l. *A.* needs not give Notice when he will make the Lease.

(5)

One married a *City Orphan in Surry*, knowing her to be such; adjudged, that he is punishable, because he is bound to take Notice, that she was a *City Orphan*, and the rather, because no Body is bound to give him Notice.

(6)
1 Vent. 136.

Nufance

Arnold *versus* Jefferson. Mich. 9 Will. 3.

IN this Case it was held, *per Holt Ch. Just.* that an Affise or *Quod permittat* &c. *Quare erexit quedam edificia*, is good, for there may be a Building without a Proper Name; it lies *de* * *Fabrica*, which is a Word more uncertain than *Edificia*, yet it will not lie *de mole*, because the Thing it self is not to be recovered as in a *Præcipe*.

(1)
Affise where 'tis good, where not.
* N. B. 184.
† 3 Cro. 402, 580.

Stopping of Lights is a Nufance, but Stopping a Prospect is not; as for Instance, one who had a House and Lights Time out of Mind, the Neighbour and Owner of

(2)
1 Mod. 54. Stopping Lights where 'tis a Nufance, and how to be abated. 1 Roll. Rep. 22.

Oath.

*P. 248

of the Next Field built a Shed, which stopped the Lights, and then made a Lease thereof to *W. R.* against whom the Plaintiff brought an Action for * this Nuisance, *Et per Curiam*, admitting he might have an *Affise of Nuisance* against the Builder, yet he cannot have an Action against his Lessee, because it would be Waste in him to pull down the Shed and abate the Nuisance; but the Plaintiff may stand on his own Ground and abate it. *Et per Curiam*, where the Thing done is a Nuisance *per intervalla*, as a Cock, or Pipe or Gutter an Action lies against the Lessee, because every fresh Running is a fresh Nuisance; yet if *W. R.* have a Way over the Ground of *W. M.* and he stops that Way, and then demises the Ground to *C.* an Action lies against the Lessee, for continuing this Nuisance.

(3)

2 Cro. 491. 5 Rep. 104.
2 Roll. 193. 2 Roll. Rep.
3. 30. contra. Who may
build a Pigeon-house,
who not.

A Lord of a Manor may build a Dove-Cote upon his Land, Parcel of his Manor, and this he may do by Virtue of his Right, as Lord thereof; but a Tenant of the Mannor cannot do it without Licence, for he can have no Right to any Privilege that may be prejudicial to others; but this is not a Common Nuisance, nor punishable in the Leet: but the Nuisance being particular, the Lord shall have an Action on the Case, or an Affise of Nuisance, as he may for building a House to the Nuisance of his Mill.

Oath.

(1)

Cro. Eliz. 486. Difference
where the Oath is to do
a Spiritual and Temporal
Thing.

ASSUMPSIT, &c. in Case he would make Oath before such a Person, he promised, &c. *Et per Curiam*, Oaths are either by Compulsion or Voluntary; and a Voluntary Oath by the Consent and Agreement of the Parties, is lawful; and in such Case, if 'tis to do a Spiritual Thing, and the Party fail, he is suable in the Ecclesiastical Court, *pro lésione fidei*; and if 'tis to do a Temporal Thing, he might formerly be punished in the Star-Chamber, if he failed, and now in *B. R.*

Hilton *versus* Byron. Pasch. 11 Will. 3. B. R.

(2)

Quakers solemn Affirma-
tion not allowable in
criminal Cases.

* P. 249

THE Plaintiff *Hilton* being a Quaker, moved for an Attachment against *Byron*, offering to make his Solemn Affirmation, according to the late Act, that he went in * Danger of his Life. *Sed per Curiam*, it was denied, unless he would take his Oath in Common Form, for this being a Criminal Proceeding, 'tis out of the Statute.

Hippesley *versus* Tuck.

(3)

2 Lev. 184. T. Jones 81.
Where Error may be
assigned contrary to the
Record. 13 Car. 2. cap.
1. 1 Wilson 85.

A Writ of Error was brought upon a Judgment in an Inferior Court, of which Court the Mayor of the Corporation was Judge, and the Error assigned was, that he had not taken the Oaths pursuant to the Statute 25 Car. 2. by which his Office of Mayor is made void, for not taking the Oath, and by Consequence the Judgment was *coram non judice*; it was insisted in Support of the Judgment, that this is not assignable for Error, because 'tis contrary to the Record, by which he is admitted to be Judge. *Sed per Curiam*, the Statute makes the Office void, as to Jurisdiction; and therefore this is assignable for Error, though contrary to the Record.

(4)

2 Lev. 242. Denning
versus Norris.

But since it hath been adjudged otherwise in a parallel Case. *J.* Error of a Judgment in an Inferior Court, for that the Sheriff who heard the Cause, and was Judge of the Court, had not taken the Oaths: The Defendant pleaded, that the Oaths were not tendered to the Sheriff; and upon a Demurrer to this Plea, it was adjudged good, because the Statute requires, that the Oath and Declaration should be tendered to him to subscribe, and the Tender is traversable.

Office.

Saunders *versus* Owen.

IN arguing this Case, which was upon a Writ of Error to reverse a Judgment in Affise for the Office of *Clerk of the Peace* to the Justices of *Kent*, it was held, that *Anno 12 Ric. 2.* The Clerk of the Peace was called, the *Clerk of the Justices*, from which it may be inferred, that at that Time there was no *Custos Rotulorum*, but all Proceedings at the Sessions were kept by the Justices; that when by the Statute * 34 Ed. 3. their Proceedings came to be recorded, it was then necessary to have a proper Officer who should be responsible for the *Rolls* and this was the *Custos Rotulorum*, who then had Power to appoint a *Deputy*, as incident to his Office, and this is the *Clerk of the Peace*: But this being found to be a profitable Office, the King did usually dispose of it; therefore to prevent such Disposals, this Office was annexed to the *Custos Rotulorum* by the Statute 37 H. 8. and since that Statute the *Custos* hath always put in the *Clerk of the Peace*, appointing him to hold the same *durante placito suo*; so that he was removeable at Will, till by the Statute * 1 Will. 3. he had a more fixed Estate, which is *quam diu se bene gesserit*.

(1)
2 Salk. 467. 5 Mod.
386. Of a *Custos Rotu-*
lorum and a Clerk of the
Peace.

* 34 Ed. 3. cap. 1.
1 Ld. Raym. 163, 164.

* 1 Will. 3. cap. 21.

Sir Robert Atkins *versus* Mountague.

ELEANOR, *Queen Dowager of H. 3.* endowed *St. Catharine's Hospital* near the *Tower*, reserving to her self, *Et Reginis Angliæ nobis succedentibus plenam potestatem* of providing a *Master* thereof: The *Queen Dowager* in the Reign of *Car. 2.* nominated a *Master*, and *Queen Consort* taking that Nomination to be void, she nominated another; it was insisted, that such a desultory Inheritance as this was, (*viz.*) *Reginis Angliæ nobis succedentibus*, could not be good by Charter, without an Act of Parliament. But *per Curiam*, This is very true, if it had been a Grant of *Advowson in Esse*, or of Lands, because he who had a Right could not always know against whom to bring his Action; * but of a Patronage newly founded there can be no precedent Right, therefore it may be limited at Pleasure, like a *Rent de novo*.

(2)
1 Chan. Rep. What
Office cannot be granted
in Reversion.

* P. 251

2. It was held, that this Office of a *Master* could not be granted in Reversion, and that the Right of granting it was in the *Queen Dowager* and not in the *Queen Consort*, unless there was no *Queen Dowager*.

Anonymous.

PER Curiam: The Office of *Marshal* of the King's Bench cannot be granted to one for a Term for Years absolutely, because in such Case it might go to an Executor or Administrator.

(3)
Office of Marshal of B. R.
cannot be granted to one
for a Term for Years.

But it may be granted to one for ninety-nine Years, if he shall so long live, because there can be no Inconvenience in such a Grant, and the present Marshal succeeded *Sutton* by Virtue of such a Lease.

Godolphin *versus* Tudor. Mich. 3 Annæ.

SIR William Godolphin being *Auditor of Wales* for Life, made the Defendant his Deputy, *quam diu se bene gesserit*, and by Articles of Agreement between them, he the said Defendant, in Consideration of the said Deputation, did covenant to pay to Sir William Godolphin 200 l. per Annum, and to save him harmless, &c. and entered into a Bond for Performance of those Articles; and in an Action of Debt brought on that Bond, the Breach assigned was for Non-payment of 200 l. per Annum for so many Years; the Defendant pleaded the Statute * of El. 6. there was a Replication, and a Rejoinder and Demurrer: And *per Curiam*, this is an Office within the Statute, but adjudged, that where the Salary is certain, in such Case, if the Principal maketh a Deputation, reserving a lesser Sum out of that Salary, such Deputation is good notwithstanding the Statute, so if the Profits are uncertain arising from Fees; if the Principal makes a Deputy, reserving a Sum certain out of the Fees and Profits of the Office, 'tis good; for in those Cases,

(4)
6 Mod. 234. Where a
Deputation is good, where
not.

* 5 & 6 Ed. 6. cap. 16.

Orders.

* P. 252

Cases, if the Fees will not answer the Reservation, the Deputy is not to pay: And though a Deputy, by his Constitution is intrusted with the whole Office of his Principal, yet he hath no Right to the Salary or Fees, for they still belong to the Principal; so that whatever he reserves to be paid out of them, is only a Reservation of what was his before, and giving away the Surplus to another; but where the Reservation or Agreement is to pay generally, *but not out of the * Profits*, the Sum reserved must be paid at all Events, and in such Case, 'tis void by the Statute.

Hutchins Serjeant's Case. Pasch. 5 Will. 3.

(5)
King's Serjeant made
Commissioner of the Great
Seal, his Patent as King's
Serjeant is determined.

HUTCHINS being made *King's Serjeant* by Patent, during Pleasure, with a Salary of 40 l. *per Annum*, was afterward made one of the *Commissioners of the Great Seal*, which Commission being afterwards dissolved, the Question was, whether he should still take Place as *King's Serjeant*; and by the Opinion of all the Judges, his Patent of King's Serjeant is determined, because his Commission put him into an Office of Judicature, which is inconsistent with the Service and Duty of his Office to be performed as *King's Serjeant*, and 'tis the same as if he had been made Lord Keeper or a Judge.

(6)
1 Vent. 270. Where an
Archdeacon forfeits his
Right to grant the Office
of a Register, the King
shall have it.

If an *Archdeacon* forfeits his Right to grant the Office of *Register*, *per 5 Ed. 6.* against the Sale of Offices, the King shall take the Advantage of that Forfeiture without Office found, for it was neither in the Archdeacon nor in the King as an Estate, but only a Power to nominate to the Office; 'tis like a *Chose in Action* and the present Vacancy is a Chattel separate from the Inheritance.

(7)
2 Lev. 151. Offices in
Fee are not within the
Statute 5 & 6 Ed. 6.

Tenant for Life of the Bailiwick of the Savoy from the Crown, made a Lease thereof for a Year to an *Under-Deputy*, and adjudged good; for by the Statute 5 & 6 Ed. 6. *cap. 16.* all Offices of Fee are excepted, and so are all Sub-grants and Sub-demises thereof.

(8)
1 Roll. Rep. 274. Con-
stable may make a Deputy.

In *false Imprisonment*, the Defendant justified as *Deputy* to a Constable; it was objected against this Plea, that a Constable could not make a *Deputy*, for he is sworn to his Office, and cannot give his Oath to his Deputy: *Sed per Curiam*, a Constable is but a ministerial Officer, therefore he may make a Deputy, for he may be sick, and so not able to execute his Office in Person, but Returns must be made in the Name of the immediate Officer, and so they must in all ministerial Offices, but not in judicial.

* P. 253

* Orders.

See Burrow's Sessions Cases.

Harrison *versus* Lewis.

(1)
A poor Man coming with
a Certificate into a Parish
shall not go back to the
Parish who certified, if he
hath gained a Settlement
elsewhere.

MOVED to quash an Order made at the Quarter-Sessions in Coventry; the Case was, *Lewis*, with his Wife and Children were settled in the Parish of *A.* and from thence they removed to the Parish of *B.* where the Husband gained a Settlement; but the Parish of *A.* having given a Certificate to the Parish of *B.* that they (the said Parish of *A.*) would receive them again when ever *Lewis* should become chargeable to *B.* and he now being chargeable, they obtained an Order from two Justices to send him and his Wife and Children to *A.* again, which Order was confirmed upon an Appeal to the Sessions, and he was sent thither accordingly, but the Order was quashed; for though it was according to the Agreement made between the two Parishes, yet a private Agreement in this Case shall not alter the Law.

The

Orders.

The King *versus* Parish of St. Nicholas in Abingdon.

ONE *Dickenson* was an Inhabitant of the Parish of *St. Helens, in Abingdon*, where he had four Children, and removed from thence into the Parish of *St. Nicholas*, where he lived some Time, and was *taxed to the Poor* there, but was removed back to *St. Helens* before he paid the Tax, and there he died, afterwards his Children were by Order of the Justices removed into the Parish of *St. Nicholas*, for that their Father had gained a Settlement there, by being * taxed to the Poor, and this by Virtue of the Statute 3 & 4 Will. 3. But *per Curiam*, there must be *Paying as well as Taxing*, to make a Settlement by that Statute.

(2)
Taxing alone, without paying, will not make a Settlement.

* Statute 3 & 4 Will. 3.

* The King *versus* Inhabitants of Winsly.

ONE *Mary Tully*, a poor Woman, was by Order of two Justices removed from *Beverley* to *Naseborough* in the *West-Riding of Yorkshire*, that being adjudged by them to be the last Place of her legal Settlement: *Naseborough* appeals to the next Sessions, and thereupon an Order was made, reciting the Difference between *Beverley* and *Naseborough*, but that it appeared to them, that this Woman was last legally settled at *Winsly*, which was a *third Parish* not concerned before, and so she was by that Order removed to *Winsly*, but it was quashed, because the Sessions had no Jurisdiction, but only to *affirm* or *reverse* the Order between the contending Parishes, and not to make an Order to charge a third Parish.

* P. 254
(3)
Sessions must either affirm or reverse an Order.
Postea 6. S. P.

Wootton Rivers *versus* St. Peter's Marlborough.

THIS Case is reported in 2 *Salk.* but it was as followeth, (*viz.*) An Order was made by two Justices to remove a poor Woman from the Parish of *Wootton Rivers* to the Parish of *St. Peter* in *Marlborough*, that being the last Place of her legal Settlement which Order being removed into *B. R.* by *Certiorari*, these Objections were made against it.

(4)
2 *Salk.* 492. S. C.
5 *Mod.* 149. Objected against an Order, that it did not set forth, that the Person removed did not rent 10 l. per Ann. and that it doth not say it was made upon the Complaint of the Parish-Officers, quashed for the last Objection.
* Cap. 12.

- (1) 'Tis not said that the *Woman was Poor*, but only that she was *lame and likely to become Poor*.
- (2) 'Tis not said, she did not *give Security*, upon giving which she is not to be removed by the Statute * 13 & 14 Car. 2.
- (3) 'Tis not said, that she did not *rent a Tenement of 10 l. per Annum*.
- (4) The Order was made upon *Complaint* to the Justices, but doth not say, upon *Complaint of the Churchwardens or Overseers of the Poor*.

But the two last Objections were chiefly insisted on to quash this Order.

Now, as to the Renting a Tenement of 10 l. per Annum: *Per Holt Ch. Just.* before the Statute 13 Car. 2. the Justices of Peace removed poor People by Consequence of Law, upon the Statute 43 Eliz. because 'tis provided by that Statute, that every Parish should maintain its own Poor, therefore they considered who were properly the Poor of a Parish, and those were such as were settled a convenient Time in a Parish, and that a *Month* was a convenient Time to make a Settlement: But there being * several Doubts made about this Matter, therefore to settle the same, the Statute before mentioned was made; upon which Statute this Question now arises (*viz.*) since the Power to remove a poor Person being not wholly founded on the Statute 13 & 14 Car. 2. but on the Law as it was before the making that Statute, whether such an Order as would serve for a Removal before that Statute, would serve since, or whether the Statute obliges the Justices to alter the Form of their Orders; and this depends upon the Operation of the Statute, whether it was by Way of Jurisdiction or Restriction, and upon Searching of Precedents by the Secondary he found, that the Orders before this Statute were all without this Clause, and so were the Orders since, whereupon as to this Point this Order was held good, and if the Fact is, that the Person removed *doth rent a Tenement of 10 l. per Annum*, it ought to be remedied by Way of Appeal to the Sessions.

* P. 255

Orders.

But as to the last Exception, that this Order was made upon *Complaint* only, and not upon Complaint of the *Churchwardens*, &c. this was held fatal; whereupon the Return of the *Certiorari* was read, and there it appeared, that the Order was made upon the Complaint of the Churchwardens and Overseers of the Poor, upon which it was urged, that this Omission and Defect in the Order itself, should be supplied and made good by the Return of the *Certiorari*. But *per Curiam*, No Man can disturb another coming into a Parish, but he or they who have Authority so to do; a *Complaint ex officio* to a Justice of Peace, is not sufficient, for it may be, that the Parish is willing, and do desire to have the Party amongst them; and if that be the Case the Justices cannot remove him; and though upon the Return of the *Certiorari* 'tis set forth, that this Order was made upon the Complaint of the Churchwardens and Overseers of the Poor, yet that will not supply the Omission in the Order itself, because the Justices had exercised their Authority before the Return was made, and they had no Power to make such a Return; they should only have returned the Order *in hæc verba*, for which reason this Order was quashed.

Scrivenham Parish versus St. Nicholas.

(5)
Order quashed, for that it did not set forth, that the Person was Poor, &c.

AN Order to remove a poor Person was quashed, because it was not said, that he was *Poor*, or *likely to become chargeable to the Parish*, &c.

* The King versus Inhabitants of Oking.

* P. 256

(6)
5 Mod. 208. 2 Salk. 473.
Where the Husband is settled, the Wife and Children must likewise be settled there.

ONE *James Tully his Wife and Children*, were removed, by an Order of two Justices, from *Oking to Horswell*, who appealed to the next Sessions, and there an Order was made to *supersede* the Order of the two Justices, and for that it did not appear to them, that the said *James Tully* (saying nothing of his Wife and Children) had a Settlement at *Horswell*, therefore they order him, and his Wife and Children, to be removed to *Oking*: These Orders being removed by *Certiorari*, it was objected, that the Order appeared to be made by the Justices, &c. at the Sessions holden for the County of *Surrey at Kingston upon Thames*, and it doth not appear by the Order, that *Kingston* was in the County of *Surrey*; but the Word *Surrey* being in the Margin, this Objection was over-ruled: The next Objection was, that it doth not appear by the Sessions Order, but that the Wife and Children might be settled at *Horswell*, for it only sets forth that *James Tully* had no Settlement there, which may be true, for he may be a Vagabond, and yet his Wife and Children may be settled there, the one by having a *Freehold*, and the other by being *Apprentices*; but *per Curiam*, this Exception was disallowed; for wherever the Husband is settled, there the Wife must likewise be settled. In the next Place it was objected, that the Sessions having only Power to *repeal or affirm*, but not to *supersede* the Order of two Justices. *Per Curiam*, *Supersede* is not a proper Word, there is a Difference between a *Supersedeas* and a *Repeal*; a Commission of *Oyer and Terminer* may be superseded, and revived by a *Procedendo* without granting a new Commission, but that cannot be done in Case of a *Repeal*; yet this Word is commonly used amongst Justices of Peace upon such Occasions; therefore they would not quash it, but referred it to a Judge of Assize.

* Sessions have Power to affirm or repeal, but not to supersede an Order.
Antea 3. S. P.

The King versus St. Ollave's Parishioners.

(7)
Order of Removal ought to be directed to the Officers of both Parishes.

UPON a *Certiorari* two Orders were returned; the first was an Order made by two Justices, for the Settlement of a poor Man, *Thomas Gill*, in such a Place, and the other was an Affirmation of the first Order upon an Appeal to the Sessions: The first Order recited, that whereas Complaint hath been made unto us, that *Thomas Gill* of the Parish of *St. Ollave*, had lately intruded himself into the Parish of *St. George*, &c. We adjudge him to be last legally settled in the Parish of *St. Ollave*; these are therefore to require you, and every of you, * to convey the said *Thomas Gill* to the Parish of *S. Ollave*; and the Order was directed to the *Churchwardens and Overseers of the Poor of the Parish of St. Ollave*, for which Reason it was quashed; for the Order ought to be directed to the *Parish Officers*, from

* P. 257

Orders.

From whence the *Person is to be removed*, and to the Officers of the Parish, who are to receive him only.

Luckington *versus* St. Austin's Parish.

THE Case was, *Simon Howell* was settled at *Luckington in Wilts*, but afterwards he and his Wife came into the Parish of *St. Austin in Bristol*, where he lived some Time, and had a Child born there, which Child was now *under the Age of seven Years*; the Father went to Sea, and there died, the Mother returned to *Luckington*, and there she died; two Justices made an Order to send the Child to *Luckington*, that being the Place where the Father was settled, which Order was confirmed upon an Appeal; but Mr. *Northey* moved to quash this Order of Sessions, because the Child must be sent to the Place where it was born, unless it can be sent *to his Parents*, where they are settled, which could not be done in this Case, because they were both dead.

(8)
Where Parents are dead, the Child must be settled where born.

Tudy *versus* Padstow. Pasch. 9 Will. 3.

AN Order made by two Justices for settling a poor Man at such a Place, was quashed at the Sessions; but because it did not appear, that it came before them by Way of *Appeal*, the Order of Sessions was quashed, for they have not Original Jurisdiction, but it must be brought before them by *Appeal*.

(9)
Sessions have no Jurisdiction but by Appeal.

Bayly's Case. Hill. 10 Will. 3.

A Maid-Servant before the 25th of March 1707, was an Inhabitant legally settled at *Overton in Hampshire*, and then contracted with one *John Orpetwood*, an Inhabitant of *Steventon*, for so much Wages, to serve him from the said 25th Day of March till Michaelmas following, which she did accordingly, and then made a new Contract with the same Master, to serve him for a longer Time, and accordingly did serve him upon that Contract till April following, in all above a Year. And *per Curiam*, though this was not an entire Contract for a Year, yet it gained her a * Settlement at *Steventon*, according to the Statute 9 Will. 3. cap.

(10)
Where the Service was for more than a Year, though not upon one Contract, yet 'tis a Settlement.

* P. 258

The Queen *versus* Branworth. Mich. 3 Annæ.

BRANWORTH was indicted at *Portsmouth*, for wandering up and down there to sell Wares as a *Petit Chapman*; and it was urged, that any *Petit Chapman* is a Vagrant within the Statute 13 Eliz. if not exempted and qualified within the Statute * 9 & 10 Will. 3. and that the Statute beforementioned did not extend to *Boroughs, or Corporate Towns*, so that as to these Places a *Petit Chapman* remained as he was before (*i. e.*) a *Vagrant*, *Sed per Holt Ch. Just.* A Man was not indictable for being a *Vagrant*; but if he was suspected to be, or really was, a loose and disorderly Person, he might be taken up and bound to his good Behaviour, and by the Statute of *Labourers*, he might be put to Work, or be compelled into Service.

(11)
6 Mod. 240. S. C.
A Man is not indictable for being a Vagrant.

* Cap. 27.

Spencer's Case. Hill. 8 Will. 3.

AN Order was made by two Justices, to remove *Spencer* from *Hinckley in Leicestershire* to *Rochby in Warwickshire*, who appealed; and at the adjourned Sessions, the two Parishes agreed to put off the Determination of the Cause till the next Sessions, which Sessions vacated the Order of the two Justices; and now it was moved, to set aside that Order, because the Appeal ought to be at the next Sessions, *per Statute* 13 Car. 2. and 3 & 4 Will. 3. there to be finally determined; and for this Reason it was quashed.

(12)
Appeal must be to the next Sessions.

Elizabeth Ashley's Case. Pasch. 9 Will. 3.

TWO Orders were removed by *Certiorari*, the Return whereof was quashed, because the Return in the Schedule annexed to the Writ, was not made by two Justices, but by the Clerk of the Peace, who was not the Person to whom the

(13)
2 Salk. 479. S. C. Order made by two Justices, though not of the Division good.

Orders.

the *Certiorari* was directed, and thereupon a new *Certiorari* was granted, which being returned and filed, it was objected, that the Order made by two Justices to remove the poor Man, &c. was naught, because it was not said, that it was made by two Justices of the *Division*, &c. according to the Statute 13 & 14 Car. 2. But *per Curiam*, the Statute as to this Matter is only directory, 'tis not restrictive or qualificatory, as the Word *Quorum* is.

* P. 259

(14)

6 Mod. 87. S. C. 2 Salk.
528. S. C. Children which
are legitimate are settled
with their Parents, and
not where born.

* Cumner Parish *versus* Milton Parish. Trin. 2 Annæ. o

A Man settled at *Cumner*, and having several Children born in that Parish, afterwards removed to *Milton* with his Children, and rented a Farm of 10 l. *per Annum* there, by which he gained a Settlement in the Parish of *Milton*, and becoming very Poor, his Children born in *Cumner* were, by an Order of two Justices, sent thither, (*viz.*) those who were *under seven Years old*, the Justices apprehending that the Place of their *Birth* was the Place of their lawful Settlement, and this Order being removed into *B. R.* by *Certiorari*, it was insisted to maintain the Order, that the Children had gained a Settlement in *Cumner* by *Birth*, which was not altered or defeated by any subsequent Act of their *Father*, in gaining a Settlement at *Milton*, for his Children were with him there only as *Nurse Children*, and his Settlement shall not be the Settlement of his Children: But *per Holt Ch. Just.* the Place where a *Bastard* is born is the Place of his Settlement, unless there is some Trick to charge the Parish; but the Place where *legitimate Children are born* is not the Place of their Settlement, for let that be where it will, the Children are settled where their Parents are settled, as for Instance, if the Father is settled in the Parish of *H.* but goes to work in the Parish of *B.* and before he gains any Settlement there, has a Son born in the Parish of *B.* and then dies, this Child shall be sent to the Parish of *H.* for 'tis not the Birth, but the Settlement of the Father that makes the Settlement of his Child; and if the Father hath gained a new Settlement for himself (as he had done in the principal Case) he hath likewise gained a new Settlement for his Children, who do not go with him to his new Settlement as *Nurse Children*, but as Part of his Family: And to what Purpose is the Father, upon coming into a new Parish, to give Notice of the Number of his Family, but only upon a Supposition that they may gain a Settlement there: But if a Man is settled in the Parish of *H.* and has Children born there, and dies, and afterwards the Mother of these Children marries a Husband, who is settled in another Parish, the Children shall go along with her, not as Part of her Family, but as *Nurse Children*, to be maintained at the Charge of the Parish where they were born, and where their Father, whilst living, was settled, and to that Parish they may be sent *after seven Years old*, as to the Place of their lawful Settlement; for this accidental Settlement of their Mother, which was only by the Marriage with a second Husband, and as she is now become one Person with him, shall not gain a Settlement for her Children.

* P. 260

(15)

2 Salk. 527. S. C. An
Order which is discharged
on an Appeal, binds only
the contending Parishes,
but if 'tis affirmed on an
Appeal, 'tis conclusive.

* Mynton Parish *versus* Stony Stratford. Mich. 13 Will. 3. B. R.

A Poor Man was sent by an Order of two Justices to *Mynton*, and upon an Appeal to the Sessions, that Order was *discharged*; then by another Order of two Justices, he was sent to *Stony Stratford*, and upon an Appeal to the Sessions, that Order was *confirmed*: Afterwards he was by another Order of two Justices, sent to *Mynton* again; and *per Curiam*, this last Order is illegal, for *per Holt Ch. Just.* Where an Order is *discharged upon an Appeal*, it binds only between the *contending Parishes*, but where an Order is ** confirmed on an Appeal*, 'tis conclusive to all Parties, for 'tis an Adjudication, that the Place to which he was sent is the last Place of his legal Settlement, which can never be avoided but by the Parish against whom it was made; and that a Parish in Reputation is chargeable, if it hath Officers, as Churchwardens, &c.

* Postea 21. S. P.

Anonymous

Orders.

Anonymous. Mich. 10 Will. 3. B. R.

(16)
AN Order made to remove a poor Man and *his Family* from *H.* to *C.* was quashed, because all might not be removable; for if a Widow have Children in a Parish where she is settled and marrieth a Husband settled in another Parish, if those Children are above seven Years old, they are not to be removed.

Tracy *versus* Talbot. Trin. 3 Annæ. B. R.

(17)
A Man took Part of an House in the Parish of *D.* and was rated as an Inhabitant of that Parish, &c. and a Distress was had for *that Rate*; and in *Replevin* it was held *per Holt Ch. Just.* That if two Houses are inhabited by two Families, and there is but *one Common Door* where both enter, yet, in respect of their Original, which is several, they continue several Houses, and are severally ratable to the Poor, and if one Family goes away, the Part where he dwelt shall be taken as an *empty House*, but if one House is divided by Partitions, and inhabited by several Families, as for Instance, if the Owner dwells in one Part, and a Stranger in another Part, these are likewise several Tenements, and the Inhabitants thereof severally ratable to the Poor whilst they dwell in those several Tenements; but if the Stranger removes out of his Part, and his Family goes away, * then the Whole becomes an entire Tenement, and the Possession thereof is devolved on the Owner, and he is ratable for the Whole as one Tenement, &c.

The King *versus* Ricelip.

(18)
THIS Case is reported in 2 *Salk.* but not as 'tis here reported, (*viz.*) A poor Man was removed from *Harrow* to *Ricelip* by an Order of two Justices, which Order was * confirmed upon an Appeal to the next Sessions, so that now he became settled at *Ricelip*; afterwards the Parishioners of *Ricelip* discovering that *Hindon* was the Place of his Settlement, got an Order from two Justices to remove him thither; and upon a *Certiorari* to remove that Order into *B. R.* the Question was, whether after an Adjudication upon an Appeal, *Ricelip* is estopped to say, that is not the last Place of his legal Settlement, and adjudged they are, for if *Ricelip* had not been the last Place of his Settlement, they could not have sent him there, but he would have been sent back to *Harrow*, which was first possessed of him, so that this is in Effect but the same Question again, which hath been already determined; and there must be an End put to it: If a Man be adjudged by two Justices to be the Father of a *Bastard Child*, he is concluded to say the contrary so long as that Order stands in Force, and 'tis an Estoppel to all Men to say the contrary, but any Man may say he is the Father.

The Queen *versus* Corbett.

(19)
THE Justices made an Order, that *T. S.* should pay *E. G.* so much Money for *Labour and Work done*, but did not set forth, that *E. G. was Servant* to the said *T. S.* and for that Reason it was quashed, for the Justices have only an Authority to Order Payment of *Wages* to Servants in * Husbandry; but by this Order it might be for Labour and Work done as a *Carpenter* or *Mason* in Building.

The Queen *versus* London.

(20)
AN Order recited, that two Men (naming them) were retained by Mr. *London*, the King's Gardener, to work in the Gardens in *Hampton Court*, at so much *per Diem*, and that they worked so many Days there, for which so much was due, and which Mr. *London* was ordered to pay; this Order being removed from *Hicks's-Hall* into *B. R.* it was quashed, because * the Justices have no Power by the Statute † 5 *Eliz.* to order Payment of *Wages* to any Labourers other than

Outlary.

than those who are employed in Husbandry; and the Reason is, because by Virtue of that Statute the Justices may compel Men to work in Husbandry, and therefore 'tis reasonable that they should enforce the Payment of their Wages, especially since by the same Statute they have Power to settle the Wages: *Et per Curiam*, where an Order is made for Payment of Wages generally, it shall be intended Wages in Husbandry; but where it appears to be otherwise, as it did in this Order it self, it shall be qualified.

Outlary. See Pleas 16.

(1)
Raym. 17. Hard. 101.
See Briton versus Cole.

BY an Outlary all personal Chattels of the Person outlawed are vested in the King by Forfeiture, but real Chattels or Freehold Estates are not vested in the King till after Inquisition found.

(2)

Therefore, if the Person outlawed do either alien or make a Lease *before Inquisition*, the King hath lost the Pernancy of the Profits,

(3)
1 Mod. 224. Sid. 43.

Outlary is a good Plea to an *Audita querela*, even upon that Judgment upon which the Party was outlawed, because the *Audita querela*, is not to defeat the Judgment but the Execution,

(4)

But if a *Writ of Error* or *Attaint* is brought upon the Judgment on which the Party is outlawed, in such Case Outlary is no Plea, for by these the Judgment it self is to be reversed and defeated, and then the Outlary, which is but a Superstructure, falls; for the Rule is, *Non admittitur exceptio ejus cujus petitur dissolutio*.

(5)
Hard. 22.

An outlawed Person was sued in the Exchequer by Bill to discover his real and personal Estate for the Benefit of the King; and upon a Demurrer to the Bill, because the Defendant is not bound to accuse himself, this Demurrer was over-ruled because the King has a Title by the Outlary, which is *quasi* a Judgment for him.

* P. 263
(6)

* A Person outlawed shall never be admitted to assign Errors, till he yields himself in Execution, for he must give Obedience to the Law before he shall have the Benefit of it; and he shall not have Writ of Error, because in such Case he will have a Sight of the Record, and if there are Errors in it, then he will appear, otherwise not: Now the Outlary is an *Attainder*, and therefore he ought to appear in Person, and submit himself to his Trial; for being attainted, it must be *ex gratia*, if he is admitted to assign Errors before.

(7)
Co. Lit. 128.

Nota, At Common Law, there was no Process of Outlary, but in Cases of Felony; and therefore, as by committing Felony a Man forfeited all his *Lands, Goods, and Chattels*, so by an Outlary for Felony, at this Time, he forfeits the same.

(8)

But Process of Outlawry in personal Actions is only by the Statute, in which Case the Goods and Chattels of the Person are only liable, for those were only chargeable in personal Actions, and so they are by an Outlary in those Actions, (*viz.*) they are forfeited to the King, and he shall likewise have the Pernancy of the Profits of the Chattels real; but this seems by a Consequence only, for that the Party being *extra legem*, is thereby become incapable to take the Profits himself.

(9)
2 Lev. 49.

A merchant having 500 *l.* Stock in the *East India Company*, was outlawed before Judgment at the Suit of *W. R.* the King upon Inquisition and Seizure, grants this Stock to the said *W. R.* and that he might sue for it in his own Name, *W. R.* gets the Stock transferred to him, and then the Merchant reversed the Outlary, and the King granted him Restitution, *de omnibus quibus nobis non est responsum*. *Et per Curiam*, this shall not restore the 500 *l.* Stock, because the

Oyer. Pardon.

Grant was executed and vested in *W. R.* and as to that Matter the King was answered.

Cafe, &c. upon a *Quantum meruit* for Meat, Drink, &c. The Defendant ^(10) 2 Vent. 282. pleaded an Outlary in Bar to the Action, setting forth, that as *Exigenda posita fuit, & ullagat, &c. & ea ratione, &c. debita juris forma waviata fuit & existit*; and upon Demurrer to this Plea it was insisted, that this Outlary could not be pleaded in Bar to the Action, it being an *Assumpsit* upon the *Quantum meruit*, because till the Things are valued, the Debt is uncertain, and by Consequence cannot be forfeited: It was doubted before *Slade's Cafe*, whether a Debt upon a Simple Contract could be forfeited by an Outlary; but in that Cafe it was adjudged a good Plea, because the Consideration * created a Debt, though it was not reduced to a certain Sum. Outlary hath been held a good Plea to an Action of *Trover*, and even in Bar to that Action, though all lies in * Damages; but in * 3 Leon. 205. the Principal Cafe the Court doubted, whether *debita juris forma waviata existit*, was too general or not. * P. 264

In a Special Verdict in Ejectment, the Cafe was, *W. R.* was outlawed in a ^(11) 1 Lev. 33. personal Action, and afterwards levied a Fine, and the King seized the Lands in the Hands of the Cognisee; and *per Curiam*, the Seizure had been good, if it was before the Fine levied, but not after, for then the Cognisee shall hold against the King.

Oyer. See Deeds.

Pardon.

The King *versus* Weedon, & al'. Mich. 12 Will. 3.

^(1)
A Conviction of *Barretrie* renders a Man *infamous*, and *incapable of being a Witness*, but a General Pardon will restore him. *Et per Holt Ch. Just.* Difference between a General and a Special Pardon.
The Difference between the Effects of the King's Special Pardon and a General Pardon, is this, (*viz.*) wherever the *Disability* is Part of the Judgment by Act of Parliament, as in Conviction of *Perjury upon the Statute*, there the King's Pardon cannot remove that Disability, but a General Pardon may; but where the Disability is only consequential, as upon an Attainder, and no Part of the Judgment, there the King's Pardon will take it away.

* Dr. Groanvelt's Cafe. Hill. 8 Will 3. 1 Ld. Raym. 213. S. C. * P. 265
Comyns S. C.

^(2)
THE *Censors of the College of Physicians, London*, have Power by their Charter, to *fine and imprison for male Practice in Physick*, and this Charter being confirmed by Act of Parliament, they accordingly did *fine and imprison Dr. Groanvelt*, for administering unwholesome Pills and Medicines; and in this Cafe it was held *per Holt Ch. Just.* and the Court, that the King is *Creditor pœne*, and that all *Fines* for Offences belong to him; and accordingly several Lords of Manors have the Fines for all Offences within their *Seigniories*, But 'tis from the Grants of the King, and that he may Pardon the Offence and remit the Crime, for this is a *Prerogative* which he cannot part withal; for as he hath the publick Revenge in his Hands, so 'tis necessary, and for his Honour, to have a Power of mitigating or remitting the exercise of it. 1 Salk. 144, 200, 263, 396. S. C. All Fines in Offences belong to the King.

Anony-

Parliament.

Anonymous.

(3)

* Cap. 3.
The King may Pardon
Felony, and he who
pleads it must find Secu-
rity for good Behaviour.
Cap. 13.

THE King may pardon Felony; but then by the Statute * 10 Ed. 3. he who will have the Benefit of such Pardon must within three Months after find Sureties for his Good Behaviour by Recognisance to be returned into the Chancery; if he doth not, then the Pardon is void; but this Statute is now repealed by the Statute 5 & 6 Will. 3. by which 'tis provided, that where a Pardon is pleaded by any Person for Felony, the Judge before whom 'tis pleaded, may at his Discretion remand or commit such Person to Prison, there to remain till he or she shall enter into a Recognisance, with two sufficient Sureties, for his or her being of the Good Behaviour for any Time under seven Years; and that an Infant or Feme Covert pleading a Pardon, shall find two such Securities, who shall enter into a Recognisance, as aforesaid.

Sid. 168.

(4)

If a Man commit Felony and Inquisition is taken, and then comes a General Pardon, yet the Forfeiture remains unless there are Words of Restitution,

(5)

Where a Man is guilty of Simony, and afterwards there is a General Pardon for all Offences which the King can Pardon, yet the Parson so guilty may be deprived, because Simony is malum in se.

Sid. 170, 222.

* P. 266

(6)

* So if a Man marries his Sister, he cannot be pardoned a parte ante; yet he may be divorced and punished, if he cohabits with her afterwards, for the subsequent Cohabitation is a new Crime.

1 Vent. 217.

(7)

Where a Man is indicted for Treason a Pardon is good, though it doth not mention the Indictment; but 'tis not so where the Defendant is indicted for Murder, for by the Statute 27 Ed. 3. cap. 2. the Pardon must recite the Indictment.

1 Vent. 134. 1 Lev. 26.

(8)

Where a Statute Pardon contains Exceptions in the Body of the Act, he who pleads such Statute, to intitle himself to the Benefit thereof, must aver himself not to be a Person excepted; but where the Exceptions follow in a distant Clause by Way of Proviso, he needs not.

Parliament.

1 Mod. 242. Difference
between a Prorogation and
an Adjournment.

(1)

A Prorogation of the Parliament is always by the King, and in this Case the Sessions must begin de novo; but an Adjournment is by each House, and the Sessions continue notwithstanding such Adjournment.

Sid. 245. Where an
Order of the House is de-
termined on a Prorogation.

(2)

An Order was made to apprehend W. R. and to take him into Custody, for arresting a Person who claimed a Privilege under a Peer, and this Arrest was six Days after a Prorogation; but upon an Habeas Corpus the Person was discharged, because the Order determined upon the Prorogation as effectually as it would have done upon a Dissolution, and so 'tis of all Things executory and imperfect, except Writs of Error or Scire Facias; but if the Person had been taken by the Serjeant at Arms before the Prorogation, and that he must be, because it might happen that the Parliament may be dissolved, and so the Party may continue in Prison for ever.

Where a Man may be
punished after Parliament
is ended.

(3)

If an Offence be committed criminally in Parliament, the Person may be punished in B. R. after the Parliament is ended; for *interest reipublice ne maleficia maneant impunita*.

Hutt. 61. 1 Roll. Rep.
29.

* P. 267

(4)

* If a Parliament is assembled, and several Orders made, and Writs of Error brought in the House of Peers, and several Bills agreed on and none signed, this

Partition. Pawn.

is but a *Convention*, and no *Parliament*, or *Session of Parliament*; but every Session in which the King Signs a Bill, is a *Parliament*, and so every Parliament is a Session, but not *è converso*.

In the *House of Peers* their Privilege begins from the *Teste of the Writ of Summons*, and upon every Session and Prorogation their Privilege is for *twenty Days* before, and *twenty Days* after a Session, this being Time enough for going to, and coming from any Part of *England*. (5) 2 Lev. 72.

A Writ of Error returnable *ad proximum Parliamentum*, is ill, unless the Prorogation is to a *certain Day*. (6) 1 Vent. 266.

Partition. See Jointenants 15.

Pawn.

WHERE Goods are *pawned* generally, without any Day of Redemption, and the *Pawner dies*, the Pawn is absolute and irredeemable; but if the *Pawnee dies*, 'tis not so. (1) Noy 137. 1 Bulst. 9.

Where Goods are *pawned*, *redeemable at a Day certain*, the Pawnee in Case of Failure of Payment at the Day, may sell them. (2) 1 Roll. Rep. 215.

* Anonymous. Pasch. 5 Will. 3.

* P. 268

PER Holt Ch. Just. Where a *Pawnee* refuses upon Tender of the Money, to redeliver the Goods, he may be indicted, because being secretly pawned, it may be impossible to *prove a Delivery* for Want of Witnesses, in Case he should bring an Action of Trover for them. (3) Where a Pawn-broker may be indicted.

Coggs *versus* Bernard. Trin. 2 Annæ. 2 Ld. Raym. 909. S. C. Comyns 133. S. C.

THERE is a Case reported by this Name in 1 Salk. which see, for it doth not relate to what follows: *Per Holt Ch. Just. + Vadium, a Pledge or Pawn*, in which Case the Pawnee hath a Property in it, for the Thing is a Security to him, that he shall be repaid the Money lent on it. (4) 1 Salk. 26. + 2 Ld. Raym. 916.

Now, [if the Thing pawned may be the Worse for using, as Clothes, &c. the Pawnee cannot use them; but if it will not be the Worse, as Jewels, &c. he may use them, but then it must be at Peril; for if the *Pawnee* is robbed, he is liable to the *Pawner*, because the Pawn is so far in the Nature of a *Depositum*, that it cannot be used but at the Peril of the *Pawnee*, and it was the Using that occasioned the Loss. (5)

But if the Pawn is laid up, and the Pawnee robbed, he is not answerable. (6)

If the Pawn is of such a Nature that the Keeping is a Charge to the Pawnee, as a *Cow or a Horse*, the Pawnee may *Milk* the one, or *ride* the other, and this is as a Recompence for his Keeping. (7)

If a Creditor takes a Pawn, he is bound to restore it upon the Repayment of the Debt, but if his Care of Keeping it be exact, and the Pawn is lost, he shall be excused, for there was no Default in him. (8)

Perjury.

(9)

And where the Pawn in such Case is lost, the Pawnee hath still his Remedy against the Pawner for the Money lent, for the Law requires nothing extraordinary of the Pawnee, but only that he shall take what Care he can to restore the Goods, upon Payment of the Money.

(10)

* P. 269

Therefore if a Pawn is lost before Tender of the Money, the Pawnee is not liable, unless there was an apparent Default * in him; but if after the Money tendered, the Pawnee will keep the Goods, and they are lost, the Pawnee shall be liable, because his Property is determined by the *Tender*, and he is afterwards become a wrongful Detainer; and he who keeps Goods wrongfully must answer for them at all Events at his own Peril, for his wrongful Detainer was the Occasion of the Loss.

(11)

3 Bulst. 17.

Where a Man pawns Goods for Money lent, and afterwards a Judgment is had against the Pawner at the Suit of one of his Creditors, the Goods in the Hands of the Pawnee shall not be taken in Execution upon this Judgment until the Money is paid to the Pawnee, because he had a qualified Property in them, and the Judgment-Creditor had only an Interest.

(12)

4 Rep. 83.

And this is agreeable to *Southcot's Case*, ff. Where a Man delivers Goods to another to keep safely, and they are afterwards stolen, he shall be answerable for them in an *Action of Detinue*; because, when they were delivered to him, he undertook to keep them safely, and therefore he ought to keep them so at his Peril, though he hath no Reward; but if he take Goods to keep them as his own, and they are afterwards stolen, he shall not be liable; and the same Law if they are pawned to him, because he hath a qualified Property in them.

Perjury.

Buxton versus Gouch. Pasch. 5 Annæ. B. R.

(1)

Perjury how punishable.

IN this Case it was held *per Curiam*, that Perjury was punishable at *Common Law*, that if it relate to Justice, 'tis punishable by the *Statute*; but if it relate to a spiritual Matter in the Spiritual Court, it may be punished there.

(2)

Style 336.

* P. 270

(3)

5 Eliz. cap. 3. Sid. 106.

* 'Tis an Offence for which the Party may be indicted, either at *Common Law* or upon the *Statute* 5 *Eliz.* by which the Punishment is enlarged, but the Nature of the Offence is not altered by that *Statute*; and in many Cases an Indictment will lie at *Common Law* when it will not lie upon the *Statute*, as for Instance, A Man may be indicted at *Common Law* for a *false Affidavit* taken before a *Master in Chancery*, but not upon the *Statute*; for this is not Perjury within the Meaning of that *Statute*, for that must be in a Matter relating to the Proof of what was in Issue.

Bulst. 322. 1 Cro. 352.
3 Cro. 137.

(4)

2 Cro. 212. 3 Inst. 164.

So where a Witness for the King swears falsely, he cannot be indicted upon the *Statute*, but he may at *Common Law*. 2 Cro. 120. *Peirce's Case*.

(5)

Yelv. 120.

A false Oath formerly taken in the *Court of Requests*, in a Matter concerning Lands, was not indictable, because that Court had no Jurisdiction in such Cases.

(6)

Cro. Eliz. 105.

Indictment of Perjury was, *quod talis per se sacro Evangelio falso deposuit, &c.* this was adjudged ill, because it was not fully alledged, that he was sworn.

Pleas not certain, and wanting full Defence.

Another Indictment was held ill, because it did not alledge that the Defendant ^(7) 3 Cro. 147, 148. *voluntarie deposuit*; and * another was likewise adjudged naught, because the * 3 Cro. 137. Oath did not relate to the Point in Issue.

Where the Plaintiff loses his Action by a false and perjured Witness produced ^(8) Sid. 90. on the Part of the Defendant, in such Case he (the Plaintiff) cannot have an Action against that Witness, till he is indicted and convicted, unless it was such a Perjury, or in such a Court, that an Indictment would not lie for it.

Pidgeon. See Nufance 3.

* Pleas not certain, and wanting full Defence. * P. 271

Hole *versus* Burgoigne. Pasch. 6 Will. 3.

DEBT for 10 l. shewing, that in Consideration he had paid the Defendant ^(1) Plea inter alia, not good. the Rent due to him, (*viz.*) 5 l. he (the Defendant) by his Deed did covenant to save him (the Plaintiff) harmless, against W. R. who claimed the Lands, and then sets forth, that W. R. did implead him * *inter alia*, in the Court of Exchequer, in an Action of Debt to recover this 5 l. and upon a Demurrer to this Declaration, it was held ill, because the *inter alia implacitavit* was too general. * Postea Rent 1 S. P.

Want of Defence is only Matter of Form, and aided upon a General Demurrer. ^(2) Want of Defence is only Form.

The Defendant *venit & defend' vim & injuriam quando, &c.* and imparled ^(3) Specially, with *salvis omnibus advantagiis & exceptionibus*; it hath been held, * Sid. 318. that after this he cannot * plead *Privilege*, because that would be to oust the Court after a full Defence; but in † *Hardres* 'tis held otherwise, because a claim † Hard. 565. of *Privilege* doth not oust the Court of Jurisdiction.

Bringloe *versus* Morison. Hill. 27 Car. 2. B. R.

IN Trespas, for *Taking his Horse* and riding him immoderately; the Defendant ^(4) Plea not answering the Declaration, but only Part of it, yet good. pleaded, that he took the Horse by *Licence*, and gave no Answer to the *Immoderate Riding*, yet adjudged good, for the *Gift* of the Action is the *Taking*, and 2 Wilfon 313. the immoderate Riding is only an Aggravation of the Trespas.

* Sheppard *versus* Taylor. Pasch. 9 Will. 3. B. R. * P. 272

IN Replevin for six Dishes; the Defendant justified under a Judgment in a ^(5) How a Judgment in an inferior Court-Baron is to be pleaded. Court-Baron and a *Levari facias* awarded thereon, by Virtue whereof he took the Dishes; and upon a Demurrer to this Plea it was adjudged ill; because an Execution upon a Judgment in a Court-Baron ought not to be by *Levari facias*, but by *Distringas*, unless there is a special Custom for that Purpose; besides, the Plaintiff should not have begun with Judgment, but with the *Plaint* entered, and *taliter processum fuit superinde*, that there was a Judgment. 1 Wilfon 316.

Hallett *versus* Burch. Pasch. 9 Will. 3. B. R. 2 Ld. Raym. 218. S. C. Skin. 674. S. C.

THIS Case is reported in * 1 Salk. by the Name of *Holler v. Busb*, and in ^(6) * Salk. 394. † 2 Salk. 580. † 2 Salk. by the Name of *Hallett v. Burt*; but the Case was thus. Where the Plea amounts to the General Issue. *Trespas* for taking his Cows, &c. The Defendant pleads and sets forth a Right by *Prescription* in the Bishop of Salisbury, to grant Replevins in such a Manor,

Pleas not certain, and wanting full Defence.

Manor, and that the Plaintiff *cepit & imparcavit* three Cows of another, and that he (the Defendant) by Virtue of a *Replevin*, as *Steward, &c.* took and drove them away, and traversed that he was guilty *aliter vel alio modo*; and upon Demurrer to this Plea it was objected, that it amounts to no more than the *General Issue*; for the Effect of it is, that those were the Cows of another Person, and that the Plaintiff took and impounded them: Now by the Impounding the Plaintiff had neither Title or Possession, and if so, he had no * Colour to bring an Action of Trespass for taking them out of the Pound, for in such Case Trespass will not lie, but *parco fracto*. *Et per Curiam*, This Plea amounts to no more than the *General Issue*, wherever the Defendant's Plea leaveth a Cause of Action in the Plaintiff either express or implied, but confesseth and avoideth it, the Plea is good, and this Confession and Avoidance is Colour, without which the Plea would amount but to the *General Issue*: Now in the Principal Case the Defendant hath set forth in his Plea, that these were not the Plaintiff's Cows, but yet, that he took them and *imparcavit* only, whereby they became in *Custodia Legis*, and therefore there was no Colour for him to bring an Action of Trespass for taking them out; but if the Defendant had pleaded *cepit & detinuit*, instead of *imparcavit*, the Plea might have been good.

* 3 Cro. 329.

* P. 273

* Hatton *versus* Morfe. 1 Annæ. B. R.

(7)
1 Salk. 394. S. C. Where
a Plea doth not amount to
the General Issue.

THERE is a short Note of this Case in 1 Salk. but the Case was thus. *In Assumpsit, &c.* The Defendant pleaded, that true it is, he did promise, but that *ante diem impetrationis Bille*, he paid the Money; and upon a Demurrer to this Plea it was objected, that it amounted to the *General Issue*. But *per Holt Ch. Just.* This doth not amount to the *General Issue*; for though *Payment may be given in Evidence upon Non Assumpsit pleaded*, yet it was long before that obtained; 'tis like giving Colour, for he says, there was a Promise, but that he performed it: Now there are many Things which may be given in Evidence upon the general Issue, and yet those Things may be pleaded Specially: as for Instance, In an Action of Debt the Defendant may plead a *Release*, or he may give it in Evidence upon *nil debet* pleaded, so in *Debt for Rent* upon a *Demise*, the Defendant may plead an *Entry and Ejection*, before any Rent became due, or he may give it in Evidence upon *nil debet*.

(8)
Of giving Colour. 1 Ld.
Raym. 551.

There are two Sorts of Colour, the one is *express*, the other *implied*.

(9)

Express, as in Trespass *Quare clausum fregit*, the Defendant in Pleading makes a Title under *W. R.* setting forth, that the Plaintiff claims under a Feoffment from the said *W. R.* by which nothing passed, but that he entered by Colour thereof: Now here the Defendant gave Colour of Action to the Plaintiff, because by the Feoffment he was Tenant at Will, and entered, and by Virtue of his Possession he may maintain an Action against every one, but not against him who hath a Right; so likewise in Trespass *Quare clausum fregit*, if the Defendant pleads, that the Plaintiff was seised, &c. and made a Lease to him for Years, there is no Occasion to give express Colour, because the Defendant allows, that the Plaintiff hath the Reversion, which is Colour enough.

Horne *versus* Lewin. Hill. 12 Will. 3. 1 Ld. Raym. 639. S. C.

(10)
2 Salk. 583. S. C. Where
it amounts to no more
than the General Issue.

* P. 17

§ Rast. Ent. 557, 558.
† 1 Roll. Rep. 46.

I N *Replevin*, the Defendant avowed the Distress taken for *Rent Arrear*; the Plaintiff replied, *De injuria sua propria absque hoc* that any Rent was in Arrear: and upon a Special Demurrer to this Replication, because it amounted to no more than the *General Issue*, it was adjudged, that this was not a proper Inducement to the Traverse, as if in Trespass the Defendant * should plead, *De injuria sua propria, absque hoc quod est culpabilis*, so that in the Principal Case, the Plaintiff should have replied, *Reins in aretro*, and conclude to the Country, that had been the proper Issue, for it is a Negative to what was before affirmed. So § *De injuria sua propria, absque hoc* that there was such a Prescription, is ill, and † *De injuria sua propria, absque hoc* that he is a Bailiff, is ill; therefore the natural and proper Replication to this Avowry, had been *nihil in aretro*; 'tis *quasi* the

Pleas amounting to the General Issue.

the General Issue, so that this Replication of Special Matter (*viz.*) *De injuria sua propria*, amounts only to the General Issue, and no other Evidence can be given, but what might as well have been given upon the proper Issue; besides, this Circumlocution must be ill, because it prolongs the Cause by enforcing the Avowant to an unnecessary Rejoinder; and though 'tis only Matter of Form, because it doth not alter the Evidence, yet upon a Special Demurrer, and shewing it for Cause, 'tis naught.

West *versus* West. Pasch. 12 Will. 3. 1 Ld. Raym. 674. S. C.

IN an Action on the Case for a False Return, the Practice was agreed to be, ^(11) Where the General Issue is pleaded and not entered within four Days the Defendant may waive it, and plead Specially. that if one pleads the General Issue, and 'tis not entered, he may within four Days of the Term waive it, and plead Specially, and if *Sunday* happen to be the last of the *four Days*, then *Monday* shall be allowed; and so in Case of a Plea in *Abatement*, and that at any Time afterwards he may waive the Special Matter and plead the General Issue, unless there is a Rule to plead as he will stand by it.

Where the Plaintiff releases after the Action brought, the Defendant ought ^(12) 2 Lut. 1178. How a Release is to be pleaded. not to plead *Actio non*, &c. but *actionem prædictæ ulterius habere non debet*, and he ought to plead it either as a Release made *pendenti brevi*, or *puis darrein Continuance*; and so it is of any Matter which happens either to abate the Writ, or to bar the Action after the Writ brought.

Where by an Act of Parliament a Man has leave to justify in general, that he acted by Virtue of such a Statute, according to the Tenor of the Act, he need not alledge particular Circumstances; but if he doth, and without taking Notice of the Act, 'tis a Waiver thereof, and his Plea must be taken as at Common Law. ^(13) 2 Lut. 1181. Of Justification under an Act of Parliament.

In *Replevin*, for taking in *Overfield*, &c. the Defendant pleads, that he was ^(14) 2 Lut. 1230. Plea that he was seised, but doth not say of what Estate, not good. seized of three Acres of Land in *Overfield*, but doth not say *in Fee*, or of what Estate he was seised; and upon a General Demurrer, the Plea was adjudged ill for * that Cause, † but to a Plea in Bar of an Action of *Trespas* it was otherwise adjudged. * P. 275. † 2 Lut. 1313.

Trespas for Breaking thirty Perch of Hedge and thirty Perch of Ditch; the Defendant prescribes for a *Way*, and that *ipse aperuit convenientem & necessariam Viam* in the Place where, &c. for Carriages, &c. and upon a Demurrer to this Plea it was adjudged ill, because he might have laid out a convenient Way without Breaking thirty Perch of Hedge. ^(15) 2 Lut. 1350. Justification for a Way not well pleaded.

In *Trespas* for Breaking his House and Close at *D.* the Defendant pleads, ^(16) 2 Lut. 1402. Where it must conclude to the Country. that the House and Close aforesaid was a Messuage, called *Raine's Dwelling-house*, and twenty Acres of Land, called *Raine's Close*, which said Messuage and twenty Acres of Land, was *solum ipsius proprium per quod*, &c. *Et hoc paratus est verificare*, the Plaintiff replies, that they were *liberum tenementum ipsius the Plaintiff*, and that the Defendant entered *de injuria sua propria*, and traversed, that they were the Freehold of the Defendant, *& hoc paratus est verificare*; it was held, that this Replication was not in Nature of a new Assignment, because that is always of another Place, but here the Place was still the same, and therefore the Bar must be taken as a real and not a common Bar, and consequently the Replication ought not to conclude with a Traverse, but should have put the Matter in Issue, (*viz.*) that it was his Freehold, and not the Defendant's Freehold, and so concluded to the Country.

In Covenant, the Breach assigned was, *Non-payment of Rent and not Repairing*, the Defendant pleaded an *Outlary* in Bar to the Action: *Et per Curiam*, ^(17) 1 Lut. 513. Where an Outlary pleaded in Bar is not good. he might have pleaded it in Bar to the Rent arrear, but not to the *Repairs*, because the Damages for not repairing were not forfeited by the Outlary, and by Consequence the Plea being in Bar, and not being good as to Part, must be ill in the Whole; but if the Defendant had pleaded this Outlary in *Abatement*, as

Poor Prisoners. Powers.

he might have done before *Imparlance*, and this to the whole Writ, it had been good, but 'tis not so in Bar.

Poor Prisoners. See Statute 6.

* P. 276

(1)
Powers are appendant or collateral.

(2)
2 Lev. 58. King v. Mellin.
Power; where destroyed.

(3)
Sid. 107. Of Powers to make Leases.

(4)
Yelv. 222.

(5)
Ch. Rep. 148. Power not well pursued.

* P. 277

(6)
Ch. Rep. 263. Smith v. Ashton.

* Powers. See Common Recovery 2.

PO W E R S are either *appendant* or *collateral*, the one is where the Testator devises to *W. R.* for Life, with a Power to make a Jointure, &c. the other is where he devises to his Executor to sell, &c. in the first Case the Power is annexed to the Estate, and derived out of it, in the other Case 'tis collateral to it.

As for Instance, a Devise to *W. R.* in Tail, Remainder over, with a Power given to him to make a Jointure to a *second Wife*, &c. The Tenant in Tail, in the Lifetime of his first Wife, suffered a *Common Recovery* to the Use of himself and his Heirs, then his Wife died, and he married a second Wife, and covenanted to stand seised to the Use of himself and *his Wife, for their Lives*, &c. adjudged, that this Power, when created, was to be executed out of the Estate-tail, which was now destroyed by suffering the Recovery, and by Consequence the Power to make a Jointure was destroyed.

Power was given by a Marriage-Settlement to a Jointress to make Leases for twenty-one Years in *Possession*; the Husband died, and she married again, and then the second Husband and Wife made a Lease, &c. in Possession, but some of the Lands were in *Lease before*; adjudged, that the Lease was void as to those Lands.

If such Power had been to make Leases generally, it shall be intended Leases in Possession.

The *Lady Antrim* being a single Woman, settled her Estate for Life, Remainder to her in Tail, with a Power to make Leases (being sole) for three Lives, &c. Afterwards she married, and then she and her Husband made a Lease, &c. for Payment of Debts: *Et per Curiam*, this is void, being *not pursuant to the Power*, for the Lease of *the Husband and Wife* is the Lease of the *Husband*, and the Difference is between a *naked Power* and a Power which arises from an *Interest*; for if a Woman hath only a naked or bare Power, as by a Will to sell Lands, she may sell, though she marry, because this is not a Power created out of any Interest; but where a Power is reserved upon a Settlement, she must execute it pursuant to that Power when it was at first reserved.

In the following Case there seems to be a contrary Resolution: *Jf.* The Father being seised of Lands in Fee, settled the same to the Use of himself for Life, Remainder to his eldest Son in Tail, with a *Power to make Leases*, or by his Last Will under Hand and Seal, to charge it with 500*l.* afterwards, by his Will in Writing, *but not sealed*; he charged it with 500*l.* for his younger Children, who upon a Bill exhibited against the Heir, had a Decree for the Money, though it was objected, that this Settlement was wholly voluntary: But *per Curiam*, the Power is well executed, for the substantial Part of it is to do the Thing; and the Neglect of a Circumstance shall not avoid it in a Court of Equity, and the rather, because such Powers are not like Conditions, strictly to be expounded, but favourably to be construed for the Benefit of the Children; and yet a Purchaser might defend himself against such a Power not well executed, especially if he had no Notice of it at the Time of the Purchase made.

Adjudged,

Prescription.

Adjudged, that where the Testator gives another a Power to sell Lands, he may sell his Inheritance, because he gives the same Power he had himself, and in such Case the Purchaser shall be intitled by the Will. ⁽⁷⁾ 2 Rep. 53. Power to sell Lands.

But there is a Difference where Lands are devised to *Executors to sell*, and where the Devise is, that *his Lands shall be sold by his Executors*; for in the first Case an Interest passes to the Executor, because the Lands are expressly devised to him; but in the other Case they have only an Authority to sell, and if * one dies, the other cannot make a Title. ⁽⁸⁾ Goldf. 2. Dyer 219. Moor 61. 1 And. 145.

Norris *versus* Trist.

IN Ejectment, the Case was: *ss.* A Feoffment was made to three, *Habendum* to two for their Lives, Remainder to the third Person for his Life, and a *Letter of Attorney to give Livery and Seisin to two*, but the Attorney made Livery to all three; it was objected, that the Power was not well executed, and therefore no Livery was made, because the Power was not pursued: *Sed per Curiam*, 'tis true, that the former Opinions have been, that Powers must be exactly pursued, but yet *†* Indorsing Livery and Seisin was always favourably expounded to support the Conveyance, therefore this Livery is good for the Lives * of two, and being made *secundum formam Chartæ*, the Remainder shall be good for the third Person. ⁽⁹⁾ 2 Mod. 78. Power good, though not strictly pursued. *†* Sid. 428. * P. 278.

Prescription.

TIME of itself can never be the efficient Cause of any Thing, for nothing is or can be done *by Time*, though every Thing is done *in Time*, therefore by Consequence it is not the Length of Time that begets the Right of Prescription, but it is a Presumption in Law, that a Possession cannot continue so long quiet and not interrupted, if it was against Right, or injurious to another. ⁽¹⁾ Grot. lib. 2. cap. 5. What makes a Prescription.

The Plaintiff declared, that the *Occupiers* of the adjoining Field have, Time out of Mind, *repaired the Fences*, which being out of Repair, his (the Plaintiff's) Beasts escaped out of his own Ground and fell into a Pit; this is good, without shewing any *Estate in the Occupiers*, but it had not been so if the Defendant himself had prescribed. ⁽²⁾ 1 Vent. 264. Prescription, that Occupiers have repaired Fences, good, without shewing any Title in them.

And yet a *Custom*, that the *Farmers of such a Farm* have always found *Cakes*, and *Ale* to the Value of 8 s. or thereabouts, at *Perambulations*, was held naught, because 'tis no more than a Prescription in *Occupiers*, which is not good in Matter to charge the Land. ⁽³⁾ 2 Lev. 164. But a Custom for Farmers of such a Farm to find Cakes, &c. not good.

Prescription by the *Inhabitants* of a Parish to dig Gravel in such a Pit, which is the Soil of *W. R.* it was doubted, whether this was good, or not, though it was to repair the Highway; but yet *Inhabitants* may prescribe for a Way, and by Consequence for necessary Materials to repair it, and so they may for a Watering Place; and so they may take Rushes in the Land of another to strew the Church; and so may *Masters of Ships* to dig Ballast in the Port of *Lynn*, for this is for the publick Good. ⁽⁴⁾ 2 Lut. 1346. Prescription for Inhabitants, &c. to repair a Way. 3 Cro. 664. March 16. 3 Lev. 160.

In Trespass, the Defendant pleads, that within the Parish of *H.* all *Occupiers* of such a Close *habent, & habere consueverunt*, a certain Way leading over the Plaintiff's Close to the Defendant's House, this was held ill, for 'tis not like a Prescription to a Way to the Church or Market, which are necessary, & *pro bono publico*. ⁽⁵⁾ 2 Vent. 186. Prescription in Occupiers, &c. to have a Way from one House to another, not good.

Presentation.

• P. 279

Hill *versus* Ellard. Mich. 16 Car. 2. B. R.

(6)
Prescription for Common
for four Cows, is good
for one Cow.

IN *Replevin*, for taking a Cow, the Defendant justified under a Prescription to have Common in the Place where, &c. for four Cows and *half a Cow*; and upon a Demurrer to this Plea it was adjudged to be very absurd to prescribe for Common for *half a Cow*; but having prescribed to have Common for *four Cows*, that was sufficient to justify for *one Cow*.

(7)
4 Mod. 318. Prescrip-
tion cannot be by one who
hath an Estate for Years.
Postea 9. S. P.

The Defendant pleads, that he was *seised*, &c. and that he and all those whose Estate he had, &c. have used to have Pot Water, &c. Adjudged ill, because a Prescription cannot be annexed to an *Estate for Years*, and he doth not say that he was *seised in Fee*.

(8)
Jones 176. Tenants in
Ancient Demesne may
join in a Prescription for
Common.

The *Inhabitants* of *E.* joined in a Claim of Common by Prescription, &c. and it was held, that Tenants in *Ancient Demesne* may join in such a Claim, because the King cannot claim for them; but in the Principal Case, all the Copyholders to one Lord ought to claim in and by that Lord, and that Lord ought to prescribe for him and his Tenants (*i. e.*) for his Copyhold Tenantss because he hath the Freehold himself; but the Lord cannot claim or prescribe for the Freeholders, for they have a Freehold in themselves; besides *Inhabitants* can never prescribe for Common, or other Profit appender, but only for Matters of *Easement*.

(9)
Prescriptions are always
alleged in the Person.

Prescriptions are properly Personal, and therefore are always alledged in the Person of him who prescribes, (*viz.*) that *he and all those whose Estate he hath*, &c. therefore a *Bishop* or *Parson* may prescribe *quod ipse & prædecessores sui*, and *all they whose Estate*, &c. for there is a perpetual Estate, and a perpetual Succession, and the Successor hath the very same Estate which his Predecessor had, for that continues, though the Person alters, like the Case of the Ancestor and the Heir: but a *Tenant for Life* or ** Years* cannot say *quorum Statum ipse habet*, because he hath a new and distinct Estate from his Predecessor, and so 'tis of all Tenants at Will, and *Inhabitants*, &c. therefore they must refer to the *Place* by Way of *Custom*.

• Antea 7.

• P. 280

* Presentation,

(1)
Sid. 93. Of a Presenta-
tion pending a Quare Im-
pedit.

IF the Defendant, or any Stranger, presents a Clerk pending a *Quare Impedit*, and afterwards the Plaintiff obtains a Verdict and Judgment, he cannot by *Virtue of that Judgment* remove him who was thus presented, but he may bring a *Scire facias* against him, to shew Cause *quare executionem non habet*; and then if it be found, that he had no Title he shall be amoved. Now the Way to prevent such a Presentation is to take out a ** ne admittas* to the Bishop, and then the Writ *Quare incumbravit* lies against such an *Incumbent*, who by *Virtue* thereof shall be amoved, and put to his *Quare Impedit*, let his Title be what it will.

2 Cro. 93.
* Ne admittas.

(2)
1 Mod. 130. 2 Mod.
183. How the Plaintiff
must declare on a Presen-
tation.

Where a Man gets the Fee to his Presentation, which is his Title, he must in his Declaration alledge the Presentation to be *tempore pacis*, for otherwise it may be intended to be *tempore belli*, and then 'tis no Title; but where the bare Presentation is not his Title, but only in Pursuance of a former Right, in such Case he may alledge it generally.

(3)

As for Instance, where a Man declares, that *W. R.* was seised of the Manor of *D.* as of *Fee*, to which an Advowson was appendant, and that being so seised he presented *W. W.* and afterwards granted the next Avoidance to the Plaintiff; this is good, for here the Plaintiff shews a precedent Right, and doth not make the Presentation itself his Title.

Privilege.

Holt *versus* Bishop of Winton.

IN a *Quare Impedit*, the Case was, *ff.* The Incumbent being seised of the Advowson of the same Church in Fee, died, and the Question was, who should present, his Heir at Law or his Executor; and upon a Demurrer, it was objected against the Right of the Heir at Law, that he could not present, because the Advowson did not descend to him till after the Death of his Ancestor, in which very Instant of Time the Church was void; and therefore the Avoidance was severed from the Inheritance, and vested in the Executor. *Sed per Curiam*, The Heir shall present, because at the same Time that the Avoidance vested in the Executor the Inheritance descended to the Heir, * and where two Titles concur in an Instant of Time, the Elder shall be preferred. (4) 3 Lev. 47. S. C. Where the Incumbent is likewise Patron and dies, his Heir, and not his Executor, shall present. 2 Wilton 194. * P. 281

Privilege.

IN the Court of Exchequer there are three Sorts of Persons who are privileged, (1) Hard. 365. 507. Of (i. e.) Debtors to the King, Officers and Accomptants; against the first of these Privilege of the Court of Exchequer. Persons any Man who has a Privilege in another Court, as an Officer or Attorney thereof, shall have his Privilege, for the Privilege of a Person as Debtor is but a general Privilege; it was at first only for the Benefit of the King, which is now disused, and a *Quo minus* is no more than a Common Action in this Court.

An Accomptant entered upon his Accompt, and adjudged, that he shall have his Privilege till the Accompt is over, because his Attendance here *de die in diem* is necessary to pass his Accompt, and the King has an Interest in his Attendance; but when the Accompt is finished, and become a Debt by being reduced to a Certainty, he then hath no other Privilege than a General Debtor. Ibidem. (2)

If an Officer commence a Suit here, no Privilege in any other Court shall prevail against it, because his Attendance is requisite here, and his Privilege is first attached in this Court. (3)

Sir Edmund Sawyer being presented in Eyre, delivered in a *Supersedeas* for his Privilege, as one of the Auditors of the Exchequer; to which it was objected, that he ought to plead his Privilege if he had any, for the Privileges of the Exchequer are all in the Red Book, and the Order is, that if an Officer of the Exchequer is impleaded elsewhere, that a Baron coming with that Book, and shewing the Order, and also avowing the Person to be an Officer of that Court, the Privilege shall be allowed without any Plea, but where the Book is not produced the Privilege must be pleaded; but if the Defendant in this Case had pleaded his Privilege; it was a Question, whether it would have been allowed, because he was an Auditor of the New Revenues, and none of the Ancient Auditors. Jones 288. (4)

* An Attorney or Philazer of the Common Pleas, if sued in B. R. may plead his Privilege, because they owe a personal Attendance to that Court; but a Serjeant at Law being sued in B. R. he cannot plead his Privilege of C. B. for Pleas, he may sign Pleas, be assigned of Counsel, and Practice in other Courts. * P. 282 (5) 1 Mod. 298. Privilege of Attorney of Common Pleas.

Where an Officer of the Court of C. B. is sued jointly with a Stranger, who hath no Privilege, in such Case, the Officer so sued shall not have his Privilege. Ibidem. (6)

Privilege.

Kirkham *versus* Wheely. Trin. 7 Will. 3. B. R. 1 Ld. Raym. 27. S. C.

(7)
2 Salk. 543. S. C.
Where a Plea in the Negative, and without full Defence, is good.

IN an Action *Qui tam*, &c. the Defendant *in propria persona sua dicit*, that he is an *Attorney of the Common Pleas*, and that the Attornies of that Court have Time out of Mind *not been suable* elsewhere: and upon a Demurrer to this Plea, it was objected, that it was pleaded in the *Negative*, (*viz.*) That Attornies of the Court of Common Pleas, &c. have *not been suable* elsewhere, and no Jurisdiction is given or shewed to any other Court: Another Objection was, that the Defendant hath not made a *full Defence*, for he only said *in propria persona sua dicit*, when it should be *venit & dicit*; and the last Objection was, because the King is made a Party in this Action, and he hath Privilege to sue where he pleases. *Sed per Curiam*, This Plea in the *Negative* is well enough, because the Privilege, if traversed, is not triable by the Country, for 'tis Matter of Law, and there is a Jurisdiction given to the Court; as to the second Objection, *venit* is no Part of the Plea, and therefore it may be omitted; but the Plea begins by the Word *dicit*, and therefore that alone is sufficient: And as to the third Objection, 'tis true, the King is intitled to bring his Action where he pleases, but the Informer is not; for if he die there is an End of the Suit, and the King is not intitled till Recovery had; and Prosecutors *Qui tam*, &c. are looked upon as *Informers*.

* Baker *versus* Swindon. Mich. 10 Will. 3. C. B. 1 Ld. Raym. 399. S. C.

* P. 283

(8)
Two Sorts of Privilege,
(*viz.*) of Court and of
Process. Postea 10. S. P.

IN this Case it was held *per Holt Ch. Just.* that *Privilege* is either of *Court* or of *Process*, as in the Court of Common Pleas, every Person who belongs to that Court, as *Attornies*, their *Clerks*, &c. shall have the Privilege of being sued there, and not elsewhere; and this is the Privilege of Court: But none shall be allowed the Privilege of *Process*, but those who are Officers of the Court, and are supposed to be always attending there.

Edwards *versus* Copland. Pasch. 6 Will. 3. B. R.

(9)
Where Privilege may be
pleaded per Attornatum.

IN an Action on the Case, the Defendant pleaded to the Jurisdiction of the Court, that he is an *Attorney of the Court of Common Pleas*, and ought to be sued there, &c. the Plaintiff replied, that he (the Defendant) is not an Attorney of the Court of Common Pleas, and concludes to the *Country*, and upon Demurrer to this Replication, the Rule was for the Defendant to answer over, for 'tis a good Traverse and Conclusion; and in this Case it was held, that the Defendant might plead this Privilege *per Attornatum*.

Willis *versus* Battershell. Trin. 6 Will. 3. B. R.

(10)
Privilege not well pleaded.

IN Assault and Battery the Defendant pleaded to the Jurisdiction of the Court, that he is one of the *Clerks of J. Cook, Prothonotary of the Court of Common Pleas*, *quodq; ipse & omnes hujusmodi Clerici de eadem Curia*, ought not to be impleaded but in that Court; and upon a Demurrer to this Plea the Plaintiff had Judgment, because the Defendant did not alledge himself to be a Clerk of the Common Pleas to whom this Privilege (as he pretended) did belong, but only that he was Clerk to a Prothonotary of that Court, and *B. R.* will not intend the Privilege to be other than as he hath pleaded it.

Privilege of Palaces and Places.

Ogle *versus* Norcliffe. Pasch. 2 Annæ. 2 Ld. Raym. 869. S. C.
Farref. 97.

THERE are two Sorts of Privilege in the Court of Common Pleas: ^(11) Two Sorts of Privilege. *Per Holt* Chief Justice, the one is of the Officers of that Court, to be sued there by Bill, and the other is of their Clerks, to be sued there, and not elsewhere by Original. Antea 7. S. P.

* Elderton's Case. Mich. 2 Annæ. B. R. 2 Ld. Raym. 978. * P. 284
S. C.

HE was committed by the *Board of Green Cloth*, for executing a *Fieri facias* ^(12) 6 Mod. 73. S. C. in *White Hall*; and upon a *Habeas Corpus* it was argued to be a lawful Execution of the Writ, and not prejudicial to the Privilege of the *Palace*, and that admitting it was a Breach of the Peace, yet the *Board of Green Cloth* had no Power to commit this Person, because he was not the *Queen's Servant*, and that Court hath only a Power over the Queen's Family, for the Government and ordering her menial Servants, and that the Privilege of *White Hall* was created by the Statute 28 H. 8. cap. 12. Antea Commitment. S. C. Holt 590.

Northey, Attorney General, argued to the contrary: *ff.* That there was a standing Commission of the Peace for the *Verge* and *Palace*, and that the *Officers of the Green Cloth* are always Commissioners, that the Statute 28 H. 8. did not create the Privileges of this Palace, but ascertained the Boundaries thereof, for the Queen may declare any House to be a Royal Palace, and this without any Act of Parliament; that such Declaration is made under the Great Seal, after which 'tis a *Palace*, though the Queen doth not reside there; for the Queen did not reside at the Tower, and yet *Burdett* had his Hand cut off for murdering his Keeper there, and was afterwards executed.

Per Powell Just. the Privileges of the Palace are by Common Law, and that in respect of the Queen's Presence; and he said, that the Breaking into the Exchequer had been held *Burglary*, though none of the Queen's Servants were there.

But *Holt* Chief Justice, denied it, and as to *Burdett's* Case, he said the same Fact cannot be a Misdemeanor and a Murder too, for the one will extinguish the other; 'tis true, his Hand was cut off, but it was without any Authority, for there was no Judgment for it; he said, that he had searched the Roll, which was Mich. 15 & 16 Eliz. Rot. 2. *Burdett* and *Muskett's* Case, and there was no Judgment for cutting off his Hand. See Stow Chr.

He held, that where there was a total Absence, as in the principal Case, where the Queen was neither present in Person nor by her Domesticks, or any of her Family, the Place was not privileged; otherwise where there was only a short and personal Absence: The Queen now resides at *Windsor*, and suppose a Murder should be committed in *White Hall*, shall that be tried before the Lord High Steward, &c. certainly not.

* Brown *versus* Burlace. 9 Will. 3. B. R.

* P. 285

THE Defendant was arrested in the *Temple*, and upon a Motion to set it aside, it was insisted for him, that the *Temple* is † privileged from Arrests by the King's Grant. ^(13) Antea Arrest 1. S. C. * Dugdale 317, 320. Stow. Chron.

But *per Holt* Chief Justice, if the King hath made any such Grant, 'tis void in Law, they having no Court of Justice within themselves there; 'tis true, the *Temple* is *extraparochial*, and not within any Parish, nor within the City, so as to come within the Customs of the City, but 'tis within the County of the City, but the *Whitefriars* is within the Jurisdiction of the City.

Yet the Court inclined not to countenance Arrests in the *Temple*, especially in *Term time*, but would not set aside this Arrest, so the Defendant was held to Special Bail.

Ruth

Process.

Ruth *versus* Weddall.

(14)
2 Lutw. Privilege of Attorney well pleaded.

2 Wilson 231, 232. contra.

DEBT upon Bond in *B. R.* brought against an Attorney of the *C. B.* the Defendant pleaded, that he is an Attorney of *C. B.* and that there is a Custom in that Court, that an Attorney shall not be compelled to answer, unless *per Billam*, and so pleads his Privilege to be sued *per Billam*, and not by Original; the Plaintiff replied, that for five Years past, before the Original filed, the Defendant had no Clients, but had withdrawn himself from the Practice and Office of an Attorney; and upon a Demurrer to this Replication, first it was objected, that the Plea was ill, because the Defendant had not set forth, that he had any Clients, or that he prosecuted or defended any Suits, that being the Reason why an Attorney should have Privilege: *Sed per Curiam*, As long as an Attorney is so upon Record, he shall have Privilege; then it was objected, that this Custom was alledged *in Fieri*, for it was, that an Attorney should not be compelled to answer, unless *per Billam*, he should have gone on, *Nec a tempore cujus contrarium memoria hominum non existit compelli consuevit*, and this would have been an Allegation of an Usage *in Fact*, which is essential to make a Custom, and therefore must be positively set forth and alledged in Pleading; but adjudged, that the Court may take Notice of the Privileges of Attornies, therefore a Custom in such Cases need not be so strictly alledged.

* P. 286

* Process.

(1)

AT Common Law, where the King was Plaintiff in any Action, whether for Debt or Damages, he had Execution against the Defendant, both for Body, Lands and Goods, but by *Magna Charta*, cap. 9. he was not to take out Execution against the Lands, if the Defendant had sufficient Goods to answer the Debt or Damages.

(2)

But where a Subject brought an Action against another Subject, either for a Debt or Damages, his Execution was only against the Goods and Chattels of the Defendant; either by *Fieri facias* or by *Levari facias*, he could not have Execution against his Lands, till the Statute of *Westm. 2.* by which *cum Debitum recuperatum est* an *Elegit* is given, and that was only for a *Moiety*; and by the Statutes 13 *Ed. 1. de mercatoribus*, by the 27 *Ed. 3.* and by the 23 *H. 8.* an *Extent* was given, but no *Capias* lay till the Statute of *Marlbridge*, cap. 23. and *Westm. 2. cap. 11.* and 25 *Ed. 3. cap. 17.* by which Process of *Capias* is given in *Accomp* and also *in Debt*, whereas before those Statutes the Process was *Summons*, *Attachment*, and *Distress* infinite.

(3)

The Process of *Capias* on a Judgment in Debt is not given by the express Words of any Statute, but arises by Consequence of Law (*i. e.*) the Statute giving a *Capias in mesne Process*, a *Capias* in Consequence lies on the Judgment, because 'tis a Rule of the Common Law, that wherever a *Capias* lies in Process before Judgment, it will lie in Execution upon the Judgment itself.

(4)

But if there is a Judgment in *C. B.* against the Bail, upon a *Scire facias* brought against them, no *Capias* lies on such Judgment; otherwise if the Judgment was given against them in Debt, for then 'tis within the Statute.

(5)

But where Judgment is given, as in a *Scire facias* upon a Recognizance against the Bail in *B. R.* a *Capias* will lie, for so has been the Course of that Court.

(6)

1 Roll. 898.

* P. 287

There was a Judgment on a *Scire facias* against the Bail, and a Writ of Error brought in the *Exchequer-Chamber*, pursuant to the Statute 3 *Jac.* adjudged, that in this Case no *Capias* * lies against them, for this Matter is not to be guided by the Custom of the King's Bench, but by the Common Law, and the Bail bound their Goods and Lands by the Recognizance, and not their Persons.

Prohibition.

PROHIBITIONS are granted either *pro defectu jurisdictionis*, or *pro defectu triationis*; as where a Man libels in the Spiritual Court for 20 s. due to him by *Custom*, for burying in the Church, the Defendant pleaded there was no such *Custom*; in this Case a Prohibition lies *pro defectu triationis*, for the Spiritual Courts cannot try a *Custom*. (1)
1 Vent. 274.

A Prohibition was granted to *Woodstreet Compter* for refusing to admit a Plea to the *Jurisdiction*, which was tendered on Oath, and before *Impar lance*. (2)
1 Vent. 180.

In a Prohibition, and upon a Motion for a Consultation, it was insisted, that it ought not to be granted without pleading or demurring to the Prohibition, for if erroneously granted, the Party could have no Remedy, either by Writ of Error or otherwise; but it was answered, that anciently in *B. R.* there were no Declarations or Demurrers upon Prohibitions, and therefore Consultations were granted upon Motions. (3)

In a Prohibition to the Spiritual Court, upon a Suggestion, that they intended to try the *Boundaries of a Parish*; the Plaintiff declared and intituled himself by Letters Patents granted to such a Corporation, who made a Lease to him, &c. the Defendant demurred to the Declaration, for not shewing the Letters Patents and the Lease, by a *profert hic in Cur'*. *Sed per Curiam*, no Consultation shall be granted for Want of pleading them, for they may be given in *Evidence*. (4)
1 Roll. Rep. 332. Letters Patents may be give in Evidence.

Where it appears upon the Face of the Libel, that the Matter is not within the Jurisdiction of the Court, nor proper for their Sentence, a Prohibition will be granted at any Time; but if the Plea of the Defendant be Matter of Spiritual Jurisdiction, and 'tis refused or over-ruled, no Prohibition lies, * for in such Case the Party must *appeal*; otherwise, if 'tis a Matter of Temporal Cognisance, as a *Modus*, or an Agreement, &c. (5)
1 Mod. 273. Where a Prohibition may be granted at any Time.
* P. 288

Freeman *versus* Shotter.

RULED, that where a Thing incident in the Spiritual Court is of a *Temporal Nature*, they must try it in the same Manner in that Court, as it would have been tried at Law, otherwise a *Procedendo* will be granted; but if the Matter incident is of a Spiritual Nature, or of Spiritual Cognizance, they may try it according to their own Law; as for Instance, if they require *two Witnesses* to the Proof of a Revocation of a Will, a *Prohibition* will not be granted, because such Proof is required at Law; but if they require two Witnesses to prove a Release, a Prohibition will be granted. (6)
How the Spiritual Court is to try a Thing of Temporal Nature.

Anonymous. Hill. 9. Will. 3.

PER Holt Ch. Just. Where an Action is commenced in an *Inferior Court* of Law, which hath no Jurisdiction of the Cause, in such Case a Prohibition will not lie after * Sentence; but 'tis otherwise, if the Suit is commenced in the *Admiralty*, or in the *Spiritual Court*, for their Law is different from ours. (7)
Where an Inferior Court hath no Original Jurisdiction, Prohibition will not lie after Sentence.
* Sid. 166. contra.

Anonymous. Hill. 13 Will. 3.

LIBEL in the Spiritual Court by the Husband and Wife, for calling the Husband *Cuckold*: Ruled *per Holt Ch. Just.* that a Prohibition shall go, because they cannot *both sue* in that Court for that Word. (8)
Prohibition to the Spiritual Court for Words.

Property.

Brown *versus* Tanner. Pasch. 2 Annæ.

(9)

Prohibition for calling the Parson Drunkard.

* Cro. Car. 207. March 6. S. P.
† 2 Roll. 296.

* P. 289
§ Cousins's Apology.

* Cambden Eliz. 263.
† Hob. 121, 290. 2 Roll.
Higins's Case 296 and
12 Rep. 42. Fuller's Case.

LIBEL in the Spiritual Court, for *Brawling in the Churchyard*, and for telling the Parson, *Thou art a pitiful drunken Parson, and a drunken Puppy*; and *Salkeld* moved for a Prohibition upon the Authority of the Case between *Star and Bucknell*, where for the like Words a Prohibition was granted, and so in *Haines's Case*; and the Reason was, because *Drunkennes* is a *Temporal Offence*; 'tis true, the Cases before mentioned were of *Drunkennes* in *Lay-Men*, but if 'tis an Offence in a *Lay-Man*, *a fortiori* it should be so in a *Clergyman*; 'tis a Crime which doth not take its Nature from the Person who commits it, but * from the Law which is offended; § 'tis true, the Canonists make every Thing which is a Sin, and forbidden by the *Ten Commandments*, to be a Spiritual Offence, as *Læsa fides*, *Murder*, *Perjury*, &c. But by the Common Law, whatever is taken Notice of and punishable by the *Temporal Laws*, is a *Temporal Offence*; and what is not punishable by the Temporal Law, but by the Spiritual Law, in such Case, that Law is a Kind of Supplanting the Temporal Law, and the Offences so punishable are Spiritual Offences, as *Fornication*, *Adultery*, &c.

Now as for *Drunkennes*, it was always accounted a *Temporal Offence*, for it was indictable at Common Law; and Alehouses were formerly appointed in the *Leet*, and before the * 24 of *Eliz.* there was scarce such a Crime in *England*: 'Tis true, a *Parson* may be deprived for *Drunkennes*, and so he may for *Buggery*, but yet he is not punishable for that Offence in the Spiritual Court, because 'tis a *Temporal Offence*; afterwards a Prohibition was granted as to the Words, but not as to the *Brawling* in the Churchyard.

Anonymous.

(10)

The ancient Course of Proceedings on a Prohibition. Plow. Com. 472. Reg. 71.

PER Ch. Just. In the Cases of Prohibitions, where they were granted upon a Motion, the ancient Course was, that the Party prohibited sued out a *Scire facias*, *Quare Consultatio non debet concedi post prohibitionem*, in which Writ the Suggestion was recited and also a Prohibition granted thereon, *ad damnum* of the Party.

Afterwards this Practice was altered, and the Course came to be thus, (*viz.*) Upon granting a Prohibition to the Plaintiff, the Court bound him in a Recognizance to prosecute an *Attachment of Contempt* against the Defendant, for suing in the Spiritual Court after a Prohibition granted, and then to declare upon the *Prohibition*; so that he who was the Defendant in that Court, is now become Actor or Plaintiff in the Court above.

The Queen *versus* Ride. Mich. 5 Annæ. B. R.

(11)

* Cap. 4. Par. 22.

A Popish Recusant convict made his Wife Executrix, the Spiritual Court admitted her to proceed in proving the Will, but a Prohibition was granted, for she is disabled by the General Clause of the * *Statute of Eliz.* and not enabled by the *Proviso*.

* P. 290

* Property. See Trespass. Replevin, 4.

Sutton *versus* Moody. 1 Ld. Raym. 250. S. C. Comyns 34. S. C.

(1)

5 Mod. 375. 2 Salk. 556.
S. C. 1. Cro. 553, 545.
Jones 440. March 44.
Of the different Sorts of Property.

IN this Case it was held *per Holt* Ch. Just. That if the Plaintiff declared in *Trespass* for Breaking his *Clofe* and killing *centum cuniculos*, 'tis good without saying *juos*, for he has a Property in them in Respect of his *Clofe* where they were killed; and of Things of this Nature there are three Kinds of Property, (*viz.*) *absolute*, *qualified* and *possessory*. (1.) A Man hath an *absolute Property* in *Feris natura sua mansuetis*. (2.) He hath a *qualified Property* in *Feris mansuetis*; and (3.) He hath a *possessory Property* in *Feris*: Now whoever hath a *possessory Property*,

Property.

Property, which is also a *Property ratione privilegii*, there he may declare for the Thing killed or taken, without saying that it was * *suum*, for he had a *Property* * 7 Rep. 17. b. by Reason of his Close in which it was, and may recover Damages, which he cannot do unless the Thing was *suum*. He farther held, that if a Man finds a *Hare* in his own Land; and in Hunting kills it on the Land of another, 'tis the *Property* of the Hunter, and not of the Person on whose Ground it was killed; so if he starts a *Hare* not on his own but another Man's Land, and Hunts it into the Land of a third Person, and there kills it, the *Property* is still in the Hunter; but if he starts a *Hare* in a Forest, and hunts and kills it in another Man's Land, the *Property* is in the Owner of the Forest.

Evans *versus* Martell. Mich. 9 Will. 3. B. R. 1 Ld. Raym. 179.
S. C. 12 Mod. 156.

ONE Harvey loaded Goods on Board a Ship, and consigned them to Evans; but by the Invoice the Goods appeared to be the *Property* of Harvey, and now in an Action brought by Evans against the Defendant Martell for these Goods, it was adjudged, that the Invoice signifies little in this Case, but that it was the Consignment of the Goods, which gave the *Property*, and vested it in Evans, and therefore he might maintain this Action; * but if they had been consigned to him upon the Account of Harvey, that would have altered the Case, for then he would have been only Factor to Harvey, and he must have brought the Action, because the *Property* was then in him. (2) Where the Consignment of Goods to another vests a *Property*. * P. 291

Gibbs *versus* Woolliscott. Trin. 7 Will. 3. B. R. Rot. 301.

TRESPASS, &c. for that the Defendant in *several* Piscaria, & in libera Piscaria sua apud D. piscavit, and did take and carry away * 500 *Salmons*; upon Not guilty pleaded, the Defendant was found guilty as to the *Fishing* in the free Fishery of the Plaintiff; and as to the *several* Fishery, the Jury found that the *Locus in quo*, &c. was Parcel of his Manor. (3) Trespass for taking Fish, and did not say suos, not in good. * Indictment 14. 3 Mod. 97. Postea 4.

Et per Holt Ch. Just. A Man may have a free Fishery in his own Soil, as for Instance, he may have a River in his Manor, and another may have a Right of Fishing there with him: But because the Plaintiff in his Declaration had not alledged, that the Defendant took *Salmones suos*, nor *ibidem cepit*, therefore the Defendant had Judgment.

The Queen *versus* Steer.

THE Defendant was indicted, for that at such a Time and Place, he illicitely fished with Nets in the Pond of T. S. and so many Carps, de Bonis & Cattallis of the said T. S. did take and carry away; it was objected against this Indictment that Fish in a Pond could not be called Bona & Catalla of any particular Person: Sed per Curiam, in a close Pond the Fish may be called * *Pisces* suos, because they cannot swim away, and therefore the Owner of such Pond hath a *Property* in them *ratione loci*; but yet they cannot properly be called Bona & Cattalla, unless they are in Trunks, and for that Reason this Indictment was held ill, but the Court would not quash it upon a Motion, but ordered the Defendant either to plead to it or to demur. (4) 6 Mod. 183. S. C. Fish in a Pond may be called suos. * 3 Mod. 97. contra. Vide Jones 440. March 48. That they may be called Pisces suos.

Mallock *versus* Eastley.

TRESPASS for taking two Does ipsius querentis, in a Close called the Park; the Defendant demurred generally, for that the Plaintiff set forth in his Declaration, that they were his Does, when by Law no Man can have a *Property* in Deer, unless they are tame or reclaimed, though they are in a Park; but in the principal Case it did not appear, that they were * in a Park, but in a Close called the Park; and for this Reason the Defendant had Judgment. (5) 3 Lev. 227. Trespass for taking two Does ipsius querentis. * P. 292

Purchase.

Purchase.

(1)
Where the Word Heirs is a Name of Purchase, and where a Word of Limitation.

THE Word *Heirs* or *Issue*, when used to denote a *single Person*, or so as to be only *designatio personæ*, are Words of Purchase only, but when *collective*, they are Words of *Limitation*.

(2)
Where the Word Heirs is *designatio personæ*.

When ever those Words *Heirs* or *Issue* have Words of *Limitation* annexed to them, they are used only as *designatio personæ*, as where a Devise is to *W. R.* for Life, Remainder to his Heirs, and to the Heirs Females of their Bodies.

(3)
Where a Remainder to a Man and his Heirs is conveyed by Way of Use.

If a Man make a Lease for Life, Remainder to his Heirs, or Remainder to himself and his Heirs, or to himself and the Heirs of his Body, the Remainder is void, and his Estate is not altered; but 'tis otherwise if he convey it by Way of Use with such *Limitations*.

(4)
1 Mod. 159. 1 Vent. 378. Remainder to Heirs Males of his Body is an Estate-tail executed.

As if he make a Feoffment to the Use of himself for Life, Remainder to the Heirs Males of his Body, this is an Entail executed in him, and so it is, if he covenanted to stand seised in the same Manner.

(5)
Where the Heir is in by Purchase.

Where the Father devises to his eldest Son upon Condition, in such Case the Son shall be in by Purchase, and not by Descent.

(6)
1 Mod. 226. Where an Estate is vested by Way of Purchase, it shall afterwards go in a Course of Descent.

The Case was, the Father having two Sons, in Consideration of the Marriage of his eldest Son, covenanted to stand seised to the Use of his said eldest Son, and the Heirs Males of his Body, Remainder to the right Heirs of the Father; the eldest Son married, and had issue Edward and four Daughters, then the eldest Son died, and afterwards Edward the Grandson died without Issue; and the Question was, who had the best Title, either the second Son or the Daughters of his elder Brother; and adjudged, that the Limitation to the eldest Son, and to the Heirs Males of his Body, is good; and that the Estate vested * in him by Way of Purchase, though at Common Law a Man could not make his own right Heir take by Purchase, without departing with the whole Fee-simple, but now by Way of Use he may; and in this Case, after the Death of the Grandfather, both the Estates-tail were vested in Edward the Grandson, (*viz.*) As Heir-male of the Body of his Grandfather and Father; and if so, then this being a Remainder vested in him as a Purchaser, the Estate shall go on in a Course of Descent, and his Sisters shall have it.

* P. 293

Quare Impedit.

(1)
This is a possessory Action, and how to declare in it.

THIS is a possessory Action, and therefore not to be maintained without a Possession, for which Reason the Plaintiff must always declare upon a *Presentation* made by himself or his Ancestor, or one whole Estate he hath, or by the Grantee of the next Avoidance, or by his Lessee for Life, or for Years.

(2)
Jones 5. Where the Ordinary cannot counterplead the Plaintiff's Title, without making a Title in himself.

In a *Quare Impedit* against the Bishop, and against A. and B. the Patron and Clerk, in which the Plaintiff declared, that *W. R.* was seised of a Manor to which the Advowson was appendant, and presented S. and that by *Escheat* the said Manor and Advowson came to the King, and that he granted them to the Plaintiff; and that S. the Incumbent being dead, it belonged to him (the Plaintiff) to present; the Bishop confesses all the Declaration, only says, that the King was seised and presented B. and traversed, that he granted the Manor and Advowson to the Plaintiff, B. the Incumbent pleads, that he is *persona impersonata ex presentatione Domini Regis*, and makes Title in the King; the Plaintiff replies, that B. was not presented by the King, &c. upon which B. demurs; and per Curiam, the Bishop's Plea

Quod Cum. Record.

Plea is not good, for he can never *counterplead the Title of the Plaintiff* without making a Title in himself, either as *Patron* or by *Lapse*, for otherwise he hath no Interest, but only Institution; and the Plea of the *Incumbent* is likewise ill, for by the Common Law he could not maintain the *Title of his Patron*; and if the Patron was not made Defendant with him, then he (the Incumbent) might plead it in Abatement; if he was made Defendant, then he was to plead his own Title, which was sometimes found to be * inconvenient, because he would plead by *Covin*; therefore by the Statute 25 *Ed. 3.* the Incumbent is allowed to plead the Title of his Patron; but in the principal Case, if he was presented by *A.* he cannot quit the Title of that Patron, and plead a Presentation and Title by another Person. * P. 294

The very Judgment in a *Quare Impedit* is an Amotion of the Incumbent, though he continue still the Possession *de facto*, and if the Plaintiff be instituted upon a Writ to the Bishop, the Defendant cannot appeal, if he doth, a Prohibition lies, because in this Case the Bishop acts as the King's Minister and not as a Judge. (3) Roll. Rep. 62.

Quod Cum. See Forgery 1. Indictment 6.

Record. See Statute 5.

Crockmere *versus* Wickins. Hill. 8 Will. 3. B. R.

AN ACTION was brought in B. R. the Defendant pleaded another Action depending between them in the same Court, and for the same Cause; the Plaintiff replied, *Nul tiel Record, &c.* adjudged, that in this Case the Defendant may pray Oyer of the Record, and the Court may order that it may be inspected, and upon such Oyer craved, an Entry shall be made for the Court to examine the Record, and Judgment shall be given upon Failure of the Record; the Defendant may likewise plead *Nul tiel Record*, * and then also the Entry and Proceedings shall be as before mentioned; but he cannot rejoin properly *quod habetur aliquod tale Recordum*; neither can he demur, for the Record is perfect, and the Pleading is at an End, and therefore a Demurrer in this Case was upon a Motion ruled to be irregular, and set aside. (1) Where Nul tiel Record is pleaded, the Party cannot demur to it. 2 Wilfon 113. * P. 295

But if the Action had been pleaded as depending in another Court, *pro eadem causa*, and the Plaintiff replied *Nul tiel Record*, the Defendant must have rejoined *quod habetur aliquod tale Recordum*. (2) Where habetur aliquod tale Recordum is a good Plea. Postea 3. S. P. Dyer 180. a.

Hambleton *versus* Lancashire. Trin. 2 Annæ. B. R.

A *Scire facias* was brought against the Bail in B. R. upon a Recognizance in that Court; the Defendant pleaded in Abatement another *Scire facias* depending in the same Court, and upon the same Judgment: The Plaintiff replied, *Nul tiel Record, & hoc paratus est verificare prout curia consideraverit*, upon which there was this Entry, *Et quia Curia Domine Regine nunc hic coram ipsa Domina Regina adisare vult super inspectionem & examinationem Recordi per prædicti the Parties allegat priusquam judicium suum inde reddant, dies inde datus est partibus prædicti coram ipsa Domina Regina, &c. Usque ad, &c. de judicio inde de & super præmissis reddendo, &c.* upon which there being a Default at the Day, Judgment was given against the Defendant: And now Mr. Broderick moved, that this was irregular, and that the Plaintiff ought to have staid for a Rejoinder, and he argued, that this was contrary to all the * Precedents, and he cited all those in the Margin. But on the other Side Mountague argued, that the Judgment was well given; and to prove it he cited Dyer 228. and * Buck's Case in B. R. which he said was a Case in Point. (3) Of pleading Nul tiel Record. * Coke Entr. 160. Raft. 334. 335. Robinson, 214. Hern. 238. Vidian 48. Thomps. 280. * Mich. 8. Will. 3. Rot. 455. Per

Recovery Common.

Per Holt Ch. Just. Where the Record pleaded is in the same Court in which the Action is brought, there *Nul tiel Record* is not so proper as to crave Oyer of the Record, and that not at a Day to come, but *instante*; but if the Plaintiff replies *Nul tiel Record*, 'tis a Traverse of the Defendant's Plea, and such an Entry (as in this Case) is the proper Course, and more to the Defendant's Advantage than Craving Oyer, because he has a Day given him to bring in the Record, and there can be no Trial in this Case, as where the Record is in another Court, and for that Reason 'tis improper to rejoin * *quod habetur aliquod tale Recordum*, as it ought where the Record is in another Court; for in such Case *B. R.* awards a *Certiorari* to that Court, and the Issue is tried by their *Certificate*, but we cannot award a *Certiorari* * to our selves; for it would be absurd to certify our selves. *Powell*, Just. at first was of a contrary Opinion, that this Judgment was not well given, because the Plaintiff had averred his Replication, which Averment ought to have been answered by the Defendant, for otherwise the Record is not closed and perfected; but it being moved again upon another Day, he came over to the Opinion of the Chief Justice.

* Antea 3.

* P. 296

(4)
Sid. 356. Where a Record is mis-recited, the other Side must not demur.

(5)
1 Vent. 212. Inferior Courts certify *tenorem Recordi*.

Adjudged, that where a Pleader misrecites a private Act of Parliament, the adverse Party cannot demur, but must plead *Nul tiel Record*, for upon a Demurrer it must be taken to be as pleaded.

In an Action of Debt brought upon a Judgment in an Inferior Court, if the Defendant pleads *Nul tiel Record*, they shall certify only *tenorem Recordi*; and the Lord Chief Justice Hale said, That he had seen *Certiorari*'s which only certify *tenorem Recordi*.

Recovery Common.

King *versus* Melling.

(1)
2 Lev. 58. Raym. 425.
1 Vent. 214, 225. Where a Devise to B. and the Issue of his Body, makes an Estate-tail, and where such an Estate is barred by Common Recovery.

* P. 297

THIS Case is reported in several Books, (*viz.*) The Father devised his Lands to his Son *B. for Life*, and after his Decease, to the Issue of his Body, &c. and for Want of such Issue Remainder over. *B.* suffered a Common Recovery, and the Question was, what Estate *B.* had. Two Judges held, that he had only an Estate for Life, because such an Estate was expressly devised to him. But *Hale Ch. Just.* held, that he had an Estate-tail by Implication, and by Consequence the Recovery well suffered, for the Words *Issue of his Body* is *nomen collectivum*, and the Words which follow, (*viz.*) for Want of such Issue, make an Estate-tail by Implication; but Judgment being given according to the Opinion of those two Judges, it was afterwards reversed in the Exchequer-Chamber, according to the Opinion of * the Chief Justice; and there it was held, that where an Estate tail is barred by a Recovery, all Things depending upon it, as Remainders, and all Things derived out of it, such as Rents, &c. are barred as well as the Estate itself, but nothing which is collateral.

Therefore a Recovery will not bar the Right of a Mortgagee, unless he is vouched, so likewise of an executory Devise; but it will bar a contingent Remainder.

(2)

So where Tenant for Life, with a Power to make a Jointure on his Wife, suffers a Common Recovery, his Power is extinguished; but 'tis otherwise where a Power is collateral; as for Instance, where an Executor has Power to sell.

(3)
2 Lut. 1225.

One seised in Fee of Lands, granted a Rent *de novo* to *A.* in Tail, Remainder to *B.* in Fee; *A.* suffered a Common Recovery, Adjudged, that the Estate-tail was barred, and that the Recoveror had a Fee-simple, which shall not determine, though *A.* die without Issue.

(4)

But if the *Tertenant* grants a Rent *de novo* to *A.* in Tail, who suffers a Common Recovery, in this Case likewise the Recoveror hath a Fee-simple, but 'tis deter-

Recufant. Release. Remainder.

determinable upon the Death of *A.* without Issue; for the Rent was not perpetual in its Nature, and in such Case the Grantee shall not prejudice the Tertenant.

Recufant. See Prohibition.

* Release.

* P. 298

Lacy versus Kinnaston. Trin 13 Will. 3. B. R. 1. Ld. Raym. 688. S. C.

THIS Case is reported in * 2 Salk. by the Name of *Clayton v. Kinnaston*, and in the * same Book, by the Name of *Lacy v. Kinnastone*, but I do not find it stated any where, but only that it was held *per Holt Ch. Just.* that a *Perpetual Covenant*, as he calls it, (*viz.*) Never to take any Advantage of a Deed or Covenant, is a Release or Defeasance of that Deed or Covenant; as for Instance, where *W. R.* enters into an Obligation to *H. S.* who covenants never to take any Advantage or to sue *W. R.* upon that Bond; if afterwards an Action of Debt should be brought upon it, in such Case *W. R.* the Obligor, may plead this Covenant in Bar to the Action, and this to avoid Circuity of Action, for the Obligee by this Covenant hath deprived himself of all the Remedy he can have upon this Bond; but if *W. R.* and *R. W.* are jointly and severally bound in a Bond to *H. S.* who covenants never to sue *W. R.* upon that Bond; this is no Release or Defeasance of the Bond neither can it be pleaded in Bar, if an Action should be brought on it, because it doth not discharge the Right, but only the Remedy against *W. R.* for he still hath a Right of Action against *R. W.* the other Obligor; therefore if he (the Obligee) should bring an Action of Debt upon this Bond against *W. R.* he is put to his Action of Covenant against the Obligee, which would not lie if this Covenant was a Release, because a Release to one Obligee is a Release to both. And *per Holt Chief Justice*, a Release of all his Right in such Lands will not discharge a Judgment not executed, because such Judgment doth not give or vest any Right, but only makes it obnoxious, and liable to Execution.

(1)
2 Salk. 575. S. C. A Release of all his Right will not release a Judgment not executed.

An Acquittance in Law ought to be a Deed sealed, but the Common Practice is otherwise; an Acquittance for Rent due at *Michaelmas* last, is a good Discharge of all former Arrears; but 'tis otherwise in an Avowry.

(2)

* Remainder.

* P. 299

A Contingent Remainder cannot depend upon an Estate for Years, because it would make an Abeyance of the Freehold, which the Law will never endure.

(1)

Neither can it depend upon an Estate in Fee, because after such a Disposal the Owner hath no Estate left to limit.

(2)

But it may depend upon an Estate for Life, or upon an Estate Tail, because those are but particular Estates, and a * bare Right of Entry will preserve it.

(3)

* 2 Lev. 35.

The Case was, *T. P.* and *W. H.* were Jointenants for Life. Remainder to the first Son of *T. P.* &c. Remainder to the right Heirs of *T. P.* afterwards the other Jointenant for Life released to *T. P.* the Question was, whether the contingent

(4)

Raym. 413. 1 Vent. Jones 136.

Remainder.

gent Remainder to the first Son of *T. P.* was destroyed by the Descent of the Inheritance to him as Heir at Law to *T. P.* and adjudged that it was, because, by the Release of the Jointenant for Life to the other, (*viz.*) to *T. P.* the Fee was executed in *T. P.* the Releasee, and there was no *particular Estate* left in that Jointenant to support this Remainder.

(5)
2 Saund. 385. 2 Lev.
39.

The Husband being seised in Fee, devised to his Wife for Life, Remainder to her first Son, Remainder to his own right Heirs; the Husband died and the Widow married again, and she and her Husband, before a Son was born, levied a Fine to one *Weston* in Fee, the Heir at Law of the Testator having before that Time by Bargain and Sale, and Fine, conveyed the Land to the said Husband and Wife: adjudged, that the *contingent Remainder to the Son* was destroyed, because the Reversion in Fee being immediately, upon the Death of the Testator, in his Heir at Law: and that Reversion being conveyed by him to the Wife by Bargain and Sale, and Fine, and she having the particular Estate for Life, that Estate for Life was merged in the Conveyance of the Inheritance to her and her Husband; and by Consequence, when the Remainder came in Being, there was nothing to support it; for it shall not be preserved by the Possibility which the Wife had to waive the Estate conveyed to her by the Bargain and Sale, &c. after the Death of her Husband.

* *Thompson versus Leech.* 1 Ld Raym. 313. S. C. Cases in Parl. 150. S. C.

* P. 300.

(6)
3 Lev. 284. 3 Mod.
296. 2 Salk. 517, 618.
2 Vent.

THIS Case is reported afterwards and in several Books, *quod vide* in the *Margin*: But *per Holt Ch. Just.* where there is a Tenant for Life, with a contingent Remainder, and he (the Tenant for Life) makes a Feoffment in Fee upon Condition, and the Contingency happens before the Condition is broken: in such Case the Contingency is for ever destroyed, because there must be a *particular Estate* in Being, or a present Right of Entry when the Contingency happens.

But if the Tenant for Life enters for Breach of the Condition before the Contingency happens, then the Contingency is revived and may vest.

(7)

(8)

Where there is Tenant for Life with a contingent Remainder to *W. R.* and then Tenant for Life is disseised, and after that a Descent and five Years is cast; now in such Case the Contingent Remainder is gone, because there is nothing left to support it, for the Right of Entry is turned into a Right of Action.

Doddington versus Kyme. 1 Ld Raym. 203. S. C. named *Luddington versus Kime.*

(9)

ADJUDGED, that after a contingent mean Remainder in Fee is once limited, no Estate after limited can be vested, but when a contingent mean Remainder is not in Fee, but only for Life, or in Tail, an Estate after limited by subsequent Words may be vested, as in *Lewis Bowles's Case*.

But if Lands are devised to *A.* for Life, and if he hath Issue a Son, then to that Son in Fee; and if he hath no Son, then to *B.* and his Heirs, no Estate shall vest in *B.*

Thomson versus Leech. Hill. 9 Will. 3. B. R. 1 Ld. Raym. 313. S. C. Cases in Parl. 150. S. C.

(10)
Where the Acts of an
Idiot are void, and where
voidable.

SIMON LEECH being *Tenant for Life*, Remainder in Tail to his first Son, Remainder to *Sir Simon* in Tail; surrendered to *Sir Simon*, and afterwards had Issue a Son; and it was found, that the Father was *Non Compos* when he made this Surrender.

Rent.

It was insisted, that this Surrender was not void, but only voidable; for as to himself he cannot avoid it by Entry or by Pleading, or by the Writ *Dum non fuit compos*, which Writ * being to avoid his own Alienations, supposes that he *demisit* and so doth the Writ *De Ideota inquirend'*, and the Law needs not prescribe Methods to avoid his Acts, if they are void in themselves.

* P. 301

But it was answered and resolved *per Holt Ch. Just.* That the Deed of a Person *Non Compos* is void, that if he Grants a Rent, and the Grantee distrains for the Arrears, he may bring Trespass, that his *Letter of Attorney* or his *Bond* are void: 'tis true, the Books say generally, that his Deeds or Bonds are not void, but that must be understood, as that the Obligor cannot plead *Non est factum*, because it appears to be a Deed fairly executed, but 'tis of no Force, because of this latent Defect or Incapacity, which the Law requires should be pleaded, and put in Issue specially, and so are all his Acts *in Pais*, except his *Feoffments*, and *Livery and Seisin*, and those are only voidable; the Reason is, because of the Respect the Law gives to a Feoffment upon the Account of its Solemnity in the Transmutation of a Freehold; and the Writ *De non compos mentis*, which says *Demisit*, that must be understood of a *Feoffment* or a *Fine*, those being the ancient and the only Conveyances at that Time: An *Infant* runs paralleled with an *Idiot* in all Cases but this, (*viz.*) that an *Idiot* is not admitted to disable or stultify himself: And lastly, his Deeds are void, because the Law hath appointed no Act to be done for the avoiding them; therefore this Deed of Surrender being void, the particular Estate for Life was not determined by it, and by Consequence the contingent Remainder not destroyed.

The Attorney General exhibited a Bill in Equity against the Defendant, to make him accompt to a *Lunatick*, and to avoid a Bargain made by him, and this was held good, tho' the *Lunatick* was no Party, for though 'tis generally true, that he ought to be made a Party, yet not in this Case, because it would be to stultify himself.

(11)
1 Ch. Rep. 112, 153.
Where a Lunatick is to be made a Party, where not.

But where a Bill is brought in Nature of an Information by the *Attorney-General* in Behalf of a *Lunatick*, there he ought to be made a Party, if 'tis not directly to stultify himself, as in the Case of an *Infant*, for he may recover his Understanding, and then he is to have his Estate at his own Disposal.

* Rent.

* P. 302

Tregarne *versus* Fletcher. Hill. 8 Will. 3. B. R. 1 Ld. Raym. 154. S. C.

THIS Case is reported in 2 Salk. but quite different: *ff. In Replevin*, the Defendant avowed, for that a Rent was granted to him issuing out of Black-acre, *inter alia*, &c. and that the Rent being in Arrear, he distrained in Black-acre *predict'*; and upon a Demurer to this Plea it was adjudged ill, for *per Holt Ch. Just.* he ought to have set forth the Grant itself, that the Plaintiff might discern it and have an Opportunity to reply an *Entry*, *Eviction*, or *Recovery*, to avoid the Defendant's Title, and the rather, because this was in the Case of a Rent-charge, for in an Assise for such a Rent all the Tertenants must be named; besides, the Rent is entire and issues out of every Parcel of the Land charged therewith, so that those Words *inter alia* shew an Uncertainty upon the Face of the Plea it self.

(1)
2 Salk. 676. By the Name of Tregame v. Fletcher. Where the Pleading *inter alia* is not good. Antea Pleas 1. S. P.

Marckar *versus* Harris. Mich. 4 Will. 3. B. R.

IN an Action of Debt for Rent, the Defendant pleaded, that the Plaintiff *Nil habuit in tenementis*, &c. The Plaintiff replied, that he was possessed of a Lease in the Tenements for forty Years, made to him by the Lord Woolton, who had Power to demise the same; and upon a Demurrer to this Replication it was adjudged good, without setting out the * Title, for *Nil habuit in tenementis* is the Issue, and the Plaintiff might reply, *Quod satis habuit in tenementis*, (*viz.*) *in Fee*, or *in Tail*, &c. and Evidence might be given at the Trial of any other

(2)
1 Wilton 314. 2 Wilton 208. Where *Nil habuit in tenementis* is a good Plea to an Action of Debt for Rent. See Postea Replevin 1. See 3 Lev. 193. Aylett v. Williams and Lee.

Rent.

Estate; for where the Issue is *Nil habuit in tenementis*, the particular Estate alleged in the Pleadings is only Form.

(3)
1 Roll. Rep. 80.

* P. 303

The Lessor made a Lease, (*viz.*) in Consideration of the Payment of the Rent herein after mentioned; he leased, &c. and afterwards in this Lease the Lessee covenanted with the Lessor, his Heirs and Assigns, to pay 10 l. yearly: adjudged, this was a Rent and not a Sum in Gros; for as a Contract is *actus contra actum*, so a Covenant is *convenire*, which *ex vi Termini* ought to be on both Sides, therefore the Word *Covenant* must relate to both.

(4)
2 Vent. 129. Where an Action of Debt is brought upon an entire Contract, and where not.

In Debt for Rent, the Plaintiff declared on a Lease at Will, dated 25th March rendering 10 l. Rent by quarterly Payments, and that he (the Defendant) entered, and was possessed till *Christmas*, following, and for 50 s. for a Quarter's Rent, ending at *Christmas* this Action was brought; and upon a Demurrer to the Declaration, it was objected against the Plaintiff, that he had sued for a Quarter's Rent due at *Christmas*, when *two Quarters more were due*, (*viz.*) *Midsummer* and *Michaelmas* Rent, and so the Action was brought for less than was due; without shewing how the Rent was discharged: *Sed per Curiam*, every Quarter's Rent is a several Debt, for which distinct Actions may be brought; and so not like an Action of Debt for Part of the Money upon an entire Contract.

(5)
Raym. 11. Whether Debt will lie where there is no Privity of Contract.

Lease to the Defendant for twenty one Years, rendering Rent, afterwards the Lessor who had the Fee, granted the Rent to the Plaintiff, but not the Reversion and the Grantee of this Rent brought an Action of Debt for the Rent Arrear; the Defendant pleaded *Nil debet*, upon which they were at Issue, and the Plaintiff had a Verdict; the Court was divided, whether an Action of Debt would lie; two Judges of Opinion, that it did not, because there was no Privity of Contract between the Grantee of the Rent, and the Lessee; two other Judges of another Opinion, because the Rent was originally subject to an Action of Debt, and though 'tis now in another, (*viz.*) in the Hands of the Grantee, yet the Law is still the same; besides, here is a Privity of Contract between them, because the Lessee having attorned to the Grantee of the Rent, this Attornment is *quasi* a new Contract between them. See the Case of *Ards v. Walkyns*.

(6)
Remedies by the Statute 32 H. 8. cap. 7. See the Case of *Howell v. Bell*.

If *Tenant in Fee* or in *Tail* die, his Executor may have an Action of Debt by the Statute 32 H. 8. for the Rent Arrear, and due in the Life Time of the Testator, or he may distrain; but before this Act the Executor had no Remedy at Common Law.

(7)
1 Cro. 471.

So it was in the Case of a *Tenant pur auter vie*, for his Executor had no Remedy till the Death of *Cestui que vie*; but now he may distrain, or have an Action of Debt for the Rent Arrear.

(8)
* P. 304

* If *Tenant for Life* die, his Executor might bring an Action of Debt for the Rent Arrear, and this was his Remedy at Common Law; but a new Remedy is given by this Statute, and that is to distrain.

(9)

But if a Grantee of a Rent for twenty Years, if he so long live, and there is Rent in Arrear, and then the Grantee dies, his Executor cannot distrain for the Arrears within this Statute, but must keep to his Remedy at Common Law.

(10)

If *Tenant in Fee* had made a Lease for Years, he or his Executors might have an Action of Debt at Common Law for the Rent Arrear, but not if he had made a Gift in Tail, or Lease for Life; because in such Case the Rent is a *Freehold*, and an Action of Debt being only a personal Action, lies only for a Chattel Interest: But now an Executor may bring Debt within this Statute, but this must be intended where the Rent issues out of Freehold, and not Copyhold Lands.

Yelv. 135.

(11)
Vent. 259.

Lessee for Years died Intestate, his Administrator made an Underlease to *W. R.* and died: Adjudged, that his Executor or Administrator may have an Action of Debt

Repleader.

Debt for the Rent Arrear upon the Underlease, and not the Administrator *de Bonis non* of the Lessee, though he hath the Reversion, for he comes in by a Collateral Title paramount the Lease.

* Repleader. See Default, 1.

* P. 305

Witts *versus* Polehampton. Mich. 10 Will. 3. B. R.

PER Holt Ch. Just. Where the Plea of the Defendant confesses the Duty for which the Plaintiff declared, but doth not sufficiently avoid it, and thereupon Issue is joined on an immaterial Thing, if 'tis found for the Plaintiff, he shall have Judgment, though the *Issue was immaterial*; but where the Defendant's Plea avoids the Plaintiff's Duty, who replies and traverses a Matter not material, and Issue is taken upon such * immaterial Traverse, and 'tis found for him, the Statute of *Jeofailes* will not help in such Case; but there must be a Repleader.

(1)

Difference where the Issue is immaterial, and where 'tis taken upon an immaterial Traverse.

* Cro. Eliz. 24, 104.

5 Rep. Nicholls's Case.

2 Cro. 5.

(2)

Trover against Husband and Wife, upon the Conversion made by the Wife to her own Use they pleaded, *quod ipsi non sunt culpabiles*, upon which they were at Issue, and the Plaintiff had a Verdict; but a Repleader was awarded, because the Wrong done being alledged to be done by the Wife, and none by the Husband, the Issue should have been *quod ipsa non est culpabilis*.

Where the Issue is immaterial.

(3)

But though a *Repleader* hath been allowed after a Verdict, as in the Case last mentioned, it was never yet allowed after a *Demurrer*; so it was reported by Mr. *Latch*; but since his Time it hath been allowed; as for Instance.

Repleader allowed after a Verdict, but never after a *Demurrer*. *Latch*. 147.

(4)

In a *Quantum meruit* by a Surgeon for curing a Wound, the Defendant pleaded a Tender of two Guineas Value 45 s. which was sufficient and traversed, that the Plaintiff deserved more; and upon a *Demurrer* to this Plea it was adjudged to be ill, because the *Traverse made it double and impertinent*; besides no such Value could be set on Guineas, and a *Repleader* was awarded, but without a *Traverse*, and the Plea was to be of a Tender of 45 s. and Issue to be taken of the Sufficiency thereof; 'tis true, it hath been often denied, that any *Repleader* should be after a *Demurrer*, but only after *Issue joined*; but here it was not only after a *Demurrer*, but after that *Demurrer* was argued.

3 Lev. 440. Repleader allowed after a *Demurrer* argued.

* P. 306

(5)

And yet since this last Case it hath been ruled, that a *Repleader* can never be awarded after a *Demurrer*, nor after a Writ of Error, but only after *Issue joined*

Mod. Cases, 102. No *Repleader* after a *Demurrer*, nor a Writ of Error.

Replevin and Avowry.

Challoner *versus* Clayton. Pasch. 10 Will. 3. S. C. cited in 1 Ld. Raym. 334.

IN *Replevin*, the Defendant avowed for Rent, setting forth, that he was *possessed* of a House for several Years yet to come, and being so *possessed*, he demised it to the Plaintiff for one Year, rendering Rent, &c. The Plaintiff replied, that the Defendant *Nihil habuit in Tenementis*; the Defendant rejoined *quod satis habuit*, &c. and upon a *Demurrer* to this Rejoinder Mr. *Northey* moved to amend it, for that he could not make good his Avowry, there being * no Title set forth; 'tis true, in an Action of Debt for Rent reserved upon a Lease, the Defendant may plead *Nihil habuit in Tenementis*, and the Plaintiff in his Replication may shew Title, because *quod cum dimisit* is a sufficient Allegation in a Declaration; but in an Avowry a Title should be shewn, and therefore 'tis not proper in a Rejoinder.

(1)

In *Replevin* the Defendant avowed and did not set forth any Title not good. See Antea Rent 2.

* See Freeman v. Jugg. Postea 3.

Baker

Replevin and Avowry. Request.

Baker *versus* Lade. Mich. 4 Will. 3. B. R.

(2)
5 Mod. Where a Deed
must be pleaded as it ope-
rates by Law.

* P. 307
† 4 Mod. 149. 2 Vent.
260. 3 Lev. 291.

IN *Replevin*, the Defendant avowed for a Rent-Charge, setting forth, that his Father was seised in Fee, and in Consideration of 5 s. and natural Affection *dedit & concessit* the Reversion to him, that this *Grant* was without any *Attornment*, and that it did operate as a *Covenant to stand seised, &c.* and * upon a Demurrer, three Judges in the † Common Pleas held the Plea to be good by the Words *Dedit & Concessit*, because the Court will judge what the Law is upon those Words, (*viz.*) that it will amount to a *Covenant to stand seised*; but *Pollexfen* Ch. Just. held the Plea to be ill, for that the Defendant ought to have pleaded according to the Operation of this Deed by Law, (*viz.*) that his Father did covenant to stand seised, and not by the Words *Dedit & Concessit*; and thereupon a Writ of Error was brought in B. R. and according to the Opinion of *Pollexfen*, the Judgment was reversed, (*viz.*) that this Deed should have been pleaded according to the Operation of Law.

Freeman *versus* Jugg. Trin. 12 Will. 3. B. R.

(3)
In Avowries for Damage-
feasant, the Avowant must
shew where the Fee is, and
how the particular Estate
is derived.

* See *Challoner v. Cley-
ton*. Antea 1.

IN *Replevin* for taking a Horse, the Defendant avowed, that *he was possessed of the Close, being the Locus in quo, &c.* for a Term of Years yet to come, and being so possessed, the Horse was Damage-feasant there, &c. the Plaintiff replied, that the Defendant was to keep up his Fences round the said Close, but that the same being down, and out of Repair, the Horse escaped into the Close for Want of good Fences, upon which they were at Issue, and at the Trial the Plaintiff was Nonsuit; and now it was moved in Arrest of Judgment, that this Avowry was ill, because in all Avowries for Damage-feasant, the Avowant must shew where the * Fee is, and how the particular Estate is derived, *quod fuit concessum per Curiam*, if there is a Demurrer to such Avowry; but because the Plaintiff by his Replication had waived that Matter, and confessed and admitted a Possession in the Avowant, that is sufficient to justify a Distress Damage-feasant and hath cured this Defect in the Avowry.

(4)
Vent. 249. In *Replevin*,
the Defendant may plead
Property either in Bar or
Abatement. 2 Lut. 1151.

* P. 308

Litt 37.

Jones 414.

In *Replevin*, the General Issue is *Non Cepit*, but the Defendant may plead *Property* in himself, and this he may do, either in Bar or in Abatement to the Action; but if he plead Property in a Stranger, he must conclude in *Abatement*; and 'tis to be observed, that upon the General Issue, *Property* cannot be given in Evidence, therefore it must be pleaded there, as to the Plaintiff in *Replevin*, he must have a Property either general or special, and his *Replevin* must be either in *Detinuit* or *Detinet*; if in the first Case, then the Plaintiff hath his Goods again, and the Action is brought only for Damages in the Taking and Detaining; if 'tis brought in the *Detinet*, then 'tis where the Goods are still detained from him.

* The Declaration must be not only of a Taking in a Vill or Town; but in *quodam loco vocat*, &c. otherwise 'tis naught upon a Demurrer, but such a Declaration in an Action of Trespass is good.

Replevin for Taking *several of his Beasts in quibusdam locis*, called A. and B. upon a Demurrer to this Declaration it was held ill, because the Plaintiff ought to shew how many were taken in one Place, and how many in another Place.

The Defendant in *Replevin* had no Damages given at Common Law, but this is by the Statute 7 and 21 H. 8.

Request.

“ Resolutions where a Special Request is to be made, and where a General *Licet sepius requisitus, &c.* is sufficient.”

(1)
Allen 25.

IF I promise B. to deliver him two Pipes of Wine out of my Cellar, to be chosen by him, in such Case he must make the Request, but if I promise B. to deliver to C. two Pipes of Wine to be chosen by C. I must Request him to choose them.

Request.

Where a Man promiseth to pay a precedent Duty, there *Licet sapius requisit* (2)
is sufficient, because there was a Duty without the Promise, as if one buy or bor- Noy 95. Latch. 93, 209.
row my Horse, and promiseth to pay so much upon Request. 3 Leon. 200.

But if the Promise is *collateral*, as for Instance, to pay the *Debt of a Stranger* (3)
upon Request; there the *Request* is Part of the Agreement and traversable, for
there was no Duty before the Promise made, and for that Reason the *Request*
must be specially alledged, for the Bringing the Action will not be a sufficient Re-
quest; † so likewise where there are mutual Promises to pay each other 4*l.* upon † 1 Saund. 35.
Request, if they do not perform such an Award, the *Request* must be specially
alledged.

* But as to this Matter, there is some Difference in the Action brought; for (4)
if I promise to redeliver, upon *Request*, such Goods as were delivered to me, * P. 309
there if an *Action of Detinue* is brought, the Plaintiff need not alledge a *Special*
Request, because there was a precedent Duty as aforesaid, and the Action is
brought for the Thing itself.

But if an *Action on the Case* is brought for these Goods, then the *Request* (5)
must be *specially alledged*; for 'tis not brought for the Thing itself, but for
Damages. Sid. 66.

Where a Promise is made to *pay Money to the Plaintiff upon Request*, there (6)
needs no special *Request*; but if the Promise was made to *A.* to pay *B.* so much
Money upon *Request*; there must be a *Special Request* alledged; and so, if the
Promise was made to the Plaintiff himself to do any collateral Act upon *Request*,
as to Purchase, &c. there must be a *Special Request* alledged.

Fitzhugh *versus* Dennington. Mich. 3 Annæ. 2 Ld. Raym. 1094.
S. C. 6 Mod. 227, 259. S. C.

DEBT upon a Bond conditioned at the *End of Seven Years*, to make the (7)
Plaintiff free of the *Joiner's Company*, if *requested thereunto*; the Defendant 2 Salk. 585. Where a Re-
pleaded, that at the *End of seven Years* he was not *requested*, and upon Demurrer quest is to do a collateral
to this Plea the Defendant had Judgment, because the *Request* being to do a Thing, it must be averred.
collateral Thing; and being Part of the Condition, ought to have been averred
by the Plaintiff, which he had not done; 'tis true, it was objected against the Plea,
that the Defendant should have pleaded generally, that he was not requested, but
he had pleaded, that he was not requested at the *End of seven Years*, &c. it should
have been *before the End of seven Years*: But *per Curiam*, the Condition was
not to make the Plaintiff free, *post terminum* of seven Years, but *ad terminum*, and
the End of a Thing is always Part of that of which 'tis an End, so that he was to
be made free on the last Day of the seven Years, and to make a *Request* some
Time of that Day, so that the Defendant might have a reasonable Time to pro-
cure it to be done.

The Defendant borrowed Money for the Use of his Mother, and gave Bond (8)
to pay it *on Demand*, if his Mother did not; and in an Action of Debt brought Mod. Cases 200. Where
on this Bond, the Defendant after *Oyer* demurred to the Declaration, for that there is a Duty before a
the Plaintiff did not lay any *Special Request*, when, and where he required the Demand made, there licet
Mother to pay it, and that the general Allegation *Licet * sapius requisitus* will not sapius requisitus is suffi-
be sufficient, which is very true, where there is no Duty till a Demand made; cient.
but *per Curiam*, here was a Duty *ab initio*, which the Law makes payable on De- * P. 310
mand, and in such Case 'tis not necessary to alledge an express Demand.

Case, &c. in which the Plaintiff declared, that *T. S.* owed him 20*l.* and that (9)
the Defendant owed *T. S.* 20*l.* and that in Consideration, the Plaintiff, at the 1 Vent. 71, 74. Where a
Special Instance and *Request* of the Defendant would procure an Order from *T. S.* special Request need not
directed to the Defendant, to pay the 20*l.* to the Plaintiff; he the Defendant be alledged.
promised to pay it, that accordingly, he (the Plaintiff) did procure an Order,
Vol. III. 8 H &c.

Rescous. Reservation.

Ec. which he shewed to the Defendant, and required him to pay the Money, which he refused; and upon a Demurrer to this Declaration it was objected, that he did not alledge that he procured this Order at the Request of the Defendant, and since the Promise was not made on a Consideration of a Duty to the Plaintiff himself, but in Consideration of a collateral Duty which became due upon a Special Promise, therefore a Request should be alledged to pay the Money; and both the Time and Place set forth specially: *Sed per Curiam*, no other Request is necessary than what is set forth in the Agreement, (*viz.*) that the Plaintiff, at the Request of the Defendant, did procure the Order, and no subsequent Request was intended.

Rescous.

Anonymous. Mich. 8 Will. 3. C. B.

(1)

PER Treby Ch. Just. of C. B. upon an unlawful Distress, the Owner of the Cattle may rescue them before impounding, but not after.

(2)

2 Lev. 26.

Rescous was returned to be done to the Bailiff: *Et per Curiam*, 'tis good, whether he be Bailiff of a *Franchise*, or the Sheriff's Bailiff.

* P. 311

(3)

3 Lev. 46.

* Case against the Sheriff upon an *Escape* on *mesne Process*, the Defendant pleaded a *Rescous*, and upon a Demurrer to this Plea, he had Judgment, though he did not set forth, that the *Rescous* was returned.

(4)

Mod. Cases, 210.

Where a Bailiff hath a Warrant to arrest a Man, and is hindered in the Execution of his Office, this is *no Rescous* unless there was an *actual Arrest*; but 'tis a Misdemeanor and Contempt of that Court out of which the Process issues.

(5)

Mod. Cases, 211.
What is a *Rescous*.

Case against the Defendant for a *Rescous* upon *mesne Process*; the Evidence at the Trial was, that the Bailiff stood at the Street Door, and sent his Follower up three Pair of Stairs in a disguised Habit, with the Warrant, who laid Hands on *W. R.* and told him, that he arrested him; but *W. R.* with the Help of some Women got from the Follower and ran down Stairs, and the Defendant hearing a Noise, run up and put the said *W. R.* into a Room, then locked the Door and would not suffer the Bailiff to enter. *Holt* Ch. Just. doubted whether this was a lawful Arrest, being by the Bailiff's Servant or Follower, and not in the Presence of the Bailiff himself; but said, that the Plaintiff must prove his Cause of Action against *W. R.* and that he must prove the Writ and Warrant, by producing sworn Copies of them, and he must prove the Manner of the Arrest, that it may appear to the Court to be a lawful Arrest; and in Point of Damages, he must likewise prove the Loss of his Debt, (*viz.*) that *W. R.* became insolvent, or could not be retaken.

* P. 312

(1)

1 Vent. 161. Reservation
what it is.

* Reservation.

A *Reservation* is a Kind of a Return of something back in Retribution of what passes away; and therefore whatever it is, it shall be carried over to him who should have succeeded to the Estate, or to the Thing demised, if no Lease had been made; and therefore, where a Man seised in Fee makes a Lease for Years, reserving Rent, this Rent is descendable to the Heir, as the Land itself out of which it issues doth descend, because it comes in *Lieu* of that which should have descended.

The

Restitution.

The *Tenant in Fee-simple* made a Lease for Years, reserving Rent to *him and to his Executors*; *per Curiam*, the Rent shall not go to them, because 'tis not a *Testamentary Estate*, and therefore it shall determine with the Life of the Lessor. (2) 2 Saund.

So if Lessee for 100 Years, make a Lease for *forty Years*, rendering Rent to *him and his Heirs*, this is void as to his *Heirs*, and shall likewise determine with the Life of the Lessor. (3)

So likewise, if the Rent is reserved to himself, without any other additional Words, because the Rent is a new Creature, and cannot have a longer Duration than its Creation gave it. (4)

But if *Tenant in Fee* make a *Lease for Years*, reserving Rent to *him and his Assigns*, this shall go to his *Heirs*. (5) 1 Vent. 162.

If 'tis reserved to him and his Assigns *durante Termino*, &c. or to him *durante Termino*, or to him and his Executors *durante Termino*; in these Cases those Additional Words shew that the Rent should continue to be paid as long as the Term is in Being, and in such Case it shall descend with the Reversion to the *Heir at Law*, and the Word *Executor* is void, and the Reservation shall be as if it had been to him only during the Term. (6)

Lessee for Years surrendered to the Lessor by *Parol*, reserving a Rent: Adjudged, that this was a good Reservation upon the *Contract*, and that an Action of Debt would lie for the Rent after the first Day of Payment incurred, though the * Reservation was by Way of *Contract*, and without any Deed. (7) 1 Vent. 172.

* P. 313

Restitution.

The King *versus* Harris. Trin. 11 Will. 3. B. R. 1 Ld. Raym. 440. 482. Comyns 61. S. C.

THE Case was, *Harris* was ousted by a *Vi Liaca amovendo*, and *Morgan* put into Possession; afterwards *Harris* got the Justices of the Peace to inquire into the Force, and accordingly, on the 20th of October, 1695. an Inquisition was taken. by which it was found, that *Morgan* forcibly entered and detained the Church, and about three Years and two Months after this Inquisition was taken, (*viz.*) in December, 1698. the Justices awarded a Precept to restore *Harris*, which was executed; and thereupon *Morgan* brought a *Certiorari*, to remove this Inquisition into B. R. and a Writ of *Restitution* was awarded, with this Entry, *Quia constat nobis super separalia Sacramenta, quod Restitutio superinde* was not made, till three Years after the *Inquisition* taken, &c. for the Statute intended a speedy Remedy for the Possession, which was lost, without trying the Right, and an Execution so long after is not a *fresh Pursuit*, and might be dangerous to Purchasers; and 'tis in this Case as in the Case of a *Conviction* of a Forcible Entry upon View, upon the Statute * 15 Rich. 2. where the Commitment must be made presently. (1) 5 Mod. 443. Where Restitution was not made till three Years after the Inquisition, 'tis not good.

* 15 Rich. 2. cap.

The Defendant's Goods were seized, being imported contrary to the Act of Navigation; and afterwards the Property was claimed by C. and others; and the Question was, whether the Court ought to grant Writs of *Restitution, ex debito Justitiæ*, upon giving Security; and adjudged not, for 'tis discretionary in the Court, and if granted 'tis *ex gratia*. (2) Hardr. 97. Where a Writ of Restitution is ex gratia.

* P. 314

* At Common Law where Goods were feloniously taken away, the Owner had no Remedy to recover them but by *Appeal*; and therefore, if the Party was indicted Formerly the King never proceeded on an Indictment till a Year after the Offence, that the Party might bring an Appeal. (3)

Returns of Procefs. Revocation.

indicted before the Appeal brought, and either convicted or acquitted, the Appeal was barred, and consequently the Owner lost his Goods for ever; for if convicted, they were forfeited to the King, and if acquitted, that was a good Bar to the Appeal; therefore in Favour to the Owner, and to give him a reasonable Time to bring his *Appeal*, the King seldom proceeded by Way of *Indictment* till a full Year after the Offence done. But then there was this Inconvenience, that the King's Evidence were either kept Secret or died, and the Party would bring an Appeal; therefore by the Statute 21 H. 8. cap. 11. the Owner had the same Advantage upon a Conviction as he had upon the *Appeal* (*viz.*) that a Writ of Restitution should be awarded as well upon a Conviction on an Indictment, as on an Appeal.

Returns of Procefs.

(1)
Yelv. 34. Before the Statute of Ed. 2. the Sheriff never put his Name to a Return.

BEFORE the Statute of Ed. 2. the Sheriff or other Officer never put his Name to the Return, but now by that Statute he must do it; and therefore, as at Common Law, the Party might say, that the Sheriff did not make the Return, because his Name was not indorsed, so he may still, though his Name is indorsed, because the Statute hath not taken away that Averment, for the Party may aver, that he who indorsed the Writ is not Sheriff.

(2)
Sid. 23. If he return Cepi Corpus, and hath not the Body ready, he shall be amerced. Postea 4. S. P.

At Common Law, if the Sheriff had made a False Return, or no Return at all, an Action on the Case would lie against him.

(3)

But if he return *Cepi Corpus*, and hath not the Body ready at the Day, he shall be amerced till he have him, or assign the Bail-Bond to the Plaintiff, but no Action lies against him in this Case for a False Return, because he is compellable to take Bail. But if an Action should be brought against him he ought not to demur to the Declaration, but to plead the Statute by which he is compellable to take Bail.

1 Vent. 55, 85.

* P. 315

(4)
1 Mod. 239. 2 Mod. 83. Where the Sheriff returns a Cepi Corpus, and hath not the Body ready, he shall be amerced. Antea 3. S. P.

* Case against the Sheriffs of London and Middlesex, for a false Return of a Bill of Middlesex, which was *Cepi Corpus* and *paratum habeo*, when in Truth they had not the Body at the Day of the Return of the Writ; the Defendants pleaded the Statute 23 H. 6. that they took Bail for the Appearance of the Prisoner, and so discharged him, and that at the Day of the Return of the Writ, they returned *Cepi Corpus*, &c. The Plaintiff replied *Protestando*, that the Defendants did not take sufficient Bail, &c. and then pleaded, that they had not the Body ready; and upon a Demurrer to this Replication it was insisted for the Plaintiff, that though an Action for an Escape would not in this Case lie against the Sheriff, because he is enjoined by the Statute to take Bail, yet an Action for this false Return will lie: But *per Curiam*, at Common Law there was no other Return than *Cepi Corpus*, or *Non est Inventus*; and that this Statute makes no Alteration of the Returns; and by Consequence no Action lies against him for returning *Cepi Corpus*, and the Words *Paratum habeo* makes him liable to be amerced till he hath the Body.

Revocation.

Countess of Bridgewater versus Duke of Bolton. 2 Ld. Raym. 968.
S. C.

(1)
1 Salk. 236. S. C. Where a Man mortgages his Lands after he hath devised them by Will, 'tis only a Revocation, quoad so much as is mortgaged.

IN this Case it was held by *Powis, Serjeant*, and admitted by *Mr. Cowper* on the other Side, as often adjudged in Chancery, that where the Testator is seized in Fee, and by his Last Will deviseth his Lands to *W. R.* in Fee, and afterwards he mortgages the same Lands in Fee to *W. W.* and then dies before the Principal

Riot.

Principal and Interest is paid, that this *Mortgage* doth not amount to a *total Revocation* of the Will, but only *quoad* so much, for which the Lands were mortgaged, and that the Devisee shall have the Equity of Redemption.

* The Testator made a Will of Lands, and afterwards he made another Will, ⁽²⁾ Hard. 375. Where a but it did not appear that any Lands were devised by this *subsequent Will*; and subsequent Will shall not this Matter being found in a special Verdict, *Hale* Ch. Just. held, that a second revoke a former. Will substantive, and independent of the first, is a Revocation thereof, whether 'tis consistent or not; but if it be depending on the first Will, or relative to it, 'tis not a Revocation so far as 'tis consistent, because it may be in Confirmation of the first Will; and this might be so in the principal Case, for any Thing appears to the contrary.

A Settlement was made, and therein a *Power* was reserved to *revoke* by Indenture sealed in the Presence of *three Witnesses*; afterwards, the Party, without taking Notice of his Power, covenanted by Indenture to levy a Fine to other Uses, which Indenture was sealed in the Presence of *three Witnesses*, and afterwards a Fine was levied accordingly; the Question was, whether this was a Revocation of the first Settlement: *Et per Curiam*, the Covenant alone will not do it, because it raises no Uses, nor passes any Estate; and the Fine alone will not do it, because 'tis no Indenture in the strict Acceptation of the Word, but both together make a good Conveyance, and by Consequence a good Revocation. ⁽³⁾ Where a Fine and Deed make a Revocation, when one will not do it.

Where a Feoffment is made to Uses, with a Power to revoke and limit new Uses, there the Feoffor may revoke and limit *in infinitum*; but where the Power is only to revoke, there, when that Power is executed, he cannot limit new Uses. ⁽⁴⁾ 1 Vent. 197. 1 Ch. Rep. 241. contra.

Riot.

* P. 317

Anonymous. Pasch. 1 Will. 3. B. R.

P E R Holt Ch. Just. an Indictment against *W. R.* for that he *cum multis aliis*, at *H. Ec.* did commit a Riot, is good. ⁽¹⁾

Adjudged, that where Rioters are convicted upon *View of two Justices*, the Sheriff must be a Party to the Inquisition, upon the Statute 13 H. 4. but if they disperse themselves before Conviction, the Sheriff need not be a Party, for in such Case the two Justices may make the Inquisition without him, and this is *pro Domino Rege*; but if the Justices neglect to make an Inquisition *within a Month after the Riot*, they are punishable, but the Lapse of the Month doth not determine that Authority to make an Inquisition, but only subjects them to a Penalty for not doing it within that Time. ⁽²⁾ Where the Sheriff must be a Party to an Inquisition for a Riot, where not.

One *Tempest*, and two more, were convicted for a Riot, upon *View of two Justices*, and of the Sheriff of the County, *contra formam Statuti*, and they were *fined by the two Justices*; and upon a Writ of Error brought, the Error assigned was, that the Sheriff did not join with the Justices in setting the *Fine*, when the Statute expressly requires, that he should be joined with the Justice in the whole Proceedings, and for this Cause the Judgment was reversed. ⁽³⁾ Raym. 386. 13 H. 4. cap. 7.

Several were indicted for a Riot, it was moved, that the Prosecutor might Name two or three, and try it against them, and that the rest might enter into a Rule to plead Not guilty, and a Rule was made accordingly, this being to prevent the Charges in putting them all to plead. ⁽⁴⁾ Mod. Cases 212.

(1)
2 Salk. 672. S. C. The Bishop is to license Schoolmasters.
* Styl. Origines 210. 211, 212. Linwood.
282. Poph. 170. Noy
184. Hutt. 100. Spar. Coll. 79, 179, 225. 1
Mod. 3. See Codex, Lib. 10. Tit. 52. Spelman Concilia 2. Voll. 176.

IN a Prohibition, &c. for *teaching a School without a Licence*: This Case is reported in 2 Salk. to which may be added Mr. Cowper's Argument against the Prohibition, (viz.) That it appears by the Books and Authorities in the Margin, that the licensing Schoolmasters, &c. belonged to the Bishop; and by the Statute 2 H. 4 cap. 15. not printed, the Bishop may punish such as teach School without Licence; that 'tis very necessary such a Care and Power should be lodged somewhere, and in no Person fitter than the Bishop, and therefore he had, Time out of Mind, exercised this Power of licensing and punishing those who teach without Licence, and that no other Person pretended to any Power to regulate in this Matter, excepting only the Bishop, and this both before and since the Reformation, that an immemorial Usage did vest a Right as well in the Spiritual as Temporal Courts, and that a legal Foundation must be intended for such an Usage, and even an Act of Parliament for that Purpose, if nothing else would be sufficient.

Dr. Lake, a Civilian, *e contra* argued, that amongst the Romans there was a *Jus Pontificum*, but Schools did not belong to them, for Schoolmasters were put in by the *supreme Magistrate* of the Town, and he it was that paid them.

'Tis true, amongst the Christians, the Bishops did erect Schools, and did appoint Schoolmasters, and paid them, but this was when the Bishop received the whole Ecclesiastical Revenue, which was then wholly subject to his Appointment, out of which Part was appropriated for the Maintenance of Schools and of the Clergy, but those were Schools of Divinity, and so not like the Principal Case, and few were permitted to be Schoolmasters, unless they were Churchmen.

(2)
2 Lev. 222.
* 13 Car. 2.

See Cro. Car. 229. 1
Mod. 21. Jones 320.
* P. 319
* Cap. 19.

Libel in the Spiritual Court for teaching School without a Licence; and upon a Motion for a Prohibition it was denied, for though the Act of * Uniformity gives the Penalty of 5 l. for this Offence, yet it doth not deprive the Ecclesiastical Courts of their * Jurisdiction in such Cases, when they proceed according to the Canon, and not upon this Act for the Penalty; and the Canons made Anno 21 Jac. and in the Year 1571. before his Reign, are made good and valid by the Statute 25 H. 8. so long as they are not against the Common Law, or the King's Prerogative, and a Licence of a School by a Bishop, is against neither.

Scire Facias.

Withers *versus* Harris. Mich. 1 Annæ. 1 Ld. Raym. 806. S. C.

(1)
Farr. 50. 1 Salk. 258. S. C.

* Sid. 317, 361. Judgment in Ejectment after a Year and a Day, a Scire facias must be brought before an Habere facias possessionem.

JUDGMENT in *Ejectment*, and after a Year and a Day there was an *Habere facias possessionem*, without bringing a *Scire facias*, and adjudged, that it * ought to be brought as well against the Tertenants as the Defendant; because as to the Possession an Ejectment is a *real Action*, it binds the Right if the Plaintiff recovers, and makes a good Title: And Holt Ch. Just. said, that he was not satisfied with that Opinion of my Lord Coke, upon the Statute of Westm. 2. that by the Common Law a *Scire facias* would not lie upon a Judgment even in personal Actions, because those general Words *five alia quæcunque irrotulata*, coming after the Words *conventus contracta*, &c. which are in their own Nature inferior to Judgments, cannot extend to Judgments which are Superior; but the Law having been taken to be otherwise, he would not argue against it.

Scire Facias.

Anonymous. Mich. 1 Annæ.

AFTER Judgment in *Ejectment*, where there are more Plaintiffs or Defendants than one, after the *Death* of one of them, Execution may be taken out by the Survivors, without a *Scire facias*, upon making a Suggestion on the Roll, that one of them is dead; but it may be a Question, where there is but one Defendant, whether Execution can be taken after his *Death* without a *Scire facias*. (2)
Judgment in Ejectment,
one dies, Execution may
be taken by the Survivors;

* Snow *versus* Manucaptors of Firebrass. Mich. 1 Annæ. 2 Ld. Raym. * P. 320
804. S. C. 2 Salk. 439. S. C.

SCIRE FACIAS against the Bail; the Breach assigned in the Writ was, that the Principal had not rendered himself *prisonæ Marecalli marescalciæ Domini Regis*, omitting the Words which usually follow, (*viz.*) *coram ipso Rege*; and for this Omission it was insisted, that the Writ was not good, for the King has another *Marshal*, and that is the Marshal of the Household. *Sed per Holt Ch. Just. & Powell Just.* The *Earl Marshal of England*, by his Office, is Marshal of the King's Bench, as appears by the Book of H. 6. and so it continued till the Reign of King James the first, when the Office *Marecalli marescalciæ*, was derived out of it; so that the Marshal of the King is the Marshal of the King's Bench, and no other Person can be understood by it; the other is *Marecallus Hospitii*, and never mentioned without that Addition. (3)
Scire facias against the
Bail. for that the Princi-
pal had not rendered him-
self prisonæ Marecalli,
&c.

Manning *versus* Bois. Hill. 2 & 3 Will. & Mar. Rot. 645. C. B.

AFTER a Writ of Error brought on a Judgment in C. B. there was a *Sci' fa' Teste 28 Novemb.* returnable *die veneris proxime post Octabis Sancti Hillarii ubicunque tunc fuerimus in Anglia*, to shew Cause *quare Executionem non habet*; to which the Defendant demurred, and it was held, that such Writs of *Sci' fa'* were made returnable sometimes at a Day certain, and sometimes upon *Common Days*; but that this Writ returnable on a Day certain, *ubicunque, &c.* was naught, for it ought to be returnable on a Common Day, if it be *coram nobis ubicunque, &c.* (4)
Scire facias returnable on
such a Day, ubicunq;
tunc fuerimus, not good.

Guillam *versus* Hardisty. Pasch. 9 Will. 3. B. R. 1 Ld. Raym. 216.
S. C.

PER Holt Ch. Just. and the Court, where a *Sci' fa.* is brought in B. R. upon a Judgment in an Inferior Court, it must appear in the Writ itself, how the Judgment came into B. R. (*viz.*) whether by *Certiorari*, or by Writ of Error, because the Execution is different; for if it came in by *Certiorari* the *Sci' fa.* must set forth the Limits of the Inferior Jurisdiction, and pray Execution within those particular Limits, and also that the Judgment came in by *Certiorari*, but if it came in by *Writ of Error*, that must be shewn in the *Sci' fa'* itself likewise, and pray * Execution generally: And whereas the *Sci' fa'* in the Principal Case recited the Judgment in the Inferior Court, *sicut per inspectionem Recordi nobis constat*, it was for that Reason ill; for it ought to be *sicut patet per Recordum*, because if the Defendant should plead *Nul tiel Record*, it must be tried by the *Record* itself, and not by *Inspection*, so this *Scire facias* was quashed. (5)
Scire facias reciting a
Judgment in an Inferior
Court, sicut per inspectio-
nem, ill.
* P. 321

Adams *versus* Tertenants of Savage. Mich. 3 Annæ. 2 Ld. Raym.
854. S. C.

IN this Case (which see 1 Salk. 40) it was held by Holt Ch. Just. That where a *Scire facias* brought against Tertenants is General, as usually it is in C. B. 'tis not proper for the Defendant to plead in Abatement, that there are other Tertenants not named, and so pray Judgment of the Writ, *& quod breve præ-* (6)
1 Salk. 40. S. C. Where
a Scire facias against Ter-
tenants is general, 'tis not
proper for the Defendant
to plead in Abatement,
that there are other Ter-
tenants. 2 Cro. 506. Co. Ent. 624. Cro. Eliz. 740. Moor 524. 2 Saund. 8.
Palm 241. 2 Roll. Rep. 53.
diſt'

Sheriff.

* Owen 104.

dict' cassetur; but to pray Judgment, if without them, *respondere debet*; but where the *Scire facias* is Particular (*i. e.*) naming the particular Tenants, in such Case the Defendant may pray Judgment of the Writ, and there being some Doubt, whether the Tertenants could plead other Tertenants in another County not named, &c. The Ch. Just. cited * *Owen's Reports*, That Tenant for Years might be a good Tenant to plead in Bar to a *Scire facias* in a personal Action, where Damages are to be recovered, but not to a *Scire facias* in a real Action.

(7)
On what Judgment a *Scire facias* would lie at Common Law, and what not.

At Common Law a *Scire facias* would lie upon a Judgment in a real Action, because the Party could have no new Original; but it would not lie upon a Judgment in a personal Action till the Statute of *Westm' 2*.

(8)
Sid. 53. After a Judgment is a Year old, the Plaintiff may have an Action of Debt, or a *Scire facias*.

Where a Judgment has slept a *Year and a Day*, the Party shall have either a *Ca. fa.* or *Fi. fa.* but is put to his Action of Debt upon the Judgment, or to a *Scire facias*, unless he continued the Process, or the Defendant brought a Writ of Error, and the Judgment was affirmed, for this is a Reviver; but it may be a Question, if the Writ of Error be *discontinued*, or the Plaintiff in Error be Nonsuit.

(9)
1 Vent. 46. Difference where a *Scire facias* is brought on a Judgment in B. R. and in C. B.

Where a *Scire facias* is brought on a Judgment in B. R. the Plaintiff must shew where the Court of B. R. was held, because that Court is Ambulatory, *ubicunque fuerimus in Anglia*; but if it be brought upon a Judgment in C. B. 'tis otherwise, because the Court of Common Pleas is confined to a certain Place.

* P. 322

(10)
Mod. Cases, 14, 212. Where a Judgment by Warrant of Attorney is not entered within a Year after, it shall not be entered without Leave of the Court.

* It was moved to set aside an Execution, for that it was irregular, the Defendant alledging, that when he confessed the Judgment, the Plaintiff and he agreed, that Execution should not be taken till after a Year; the Plaintiff insisted, that he had staid a Year after the Defendant had given the Warrant of Attorney to confess Judgment; then the Question was, whether the Year should be computed from the Date of the Judgment, or from the Date of the Warrant of Attorney. *Et per Curiam*, It seems necessary that the Plaintiff should bring a *Scire facias* since the Execution was delayed for more than a Year; however the Practice is, that if Judgment upon a Warrant of Attorney is not entered within a Year, it shall not be entered afterwards without Leave of the Court.

Sheriff. See Dissenters, 4

(1)

THE Sheriff is the King's Officer, and therefore is always made and appointed by the King, unless in *Counties Palatine*.

(2)

He hath *Custodiam Comitatus*, and therefore hath an Authority to raise the *Posse Comitatus* to suppress Rebellions, Riots, &c.

(3)

He hath a Jurisdiction both in *criminal and civil Cases*, and for this Purpose he hath two Courts, (*viz.*) his *Tourn or View for criminal Causes*, which is therefore the *King's Court*, because Pleas of the Crown can be in no other than the King's Courts; the other is his *County Court for civil Causes*, and this is the Court of the Sheriff himself, and for this Reason 'tis called, the County Court.

(4)

Yelv. 45. Where he levies the Goods by a *Fi. fa.* he may sell them, though he is out of his Office.

It was formerly held, that if he take Goods in Execution by Virtue of a *Fi. fa.* and is out of his Office before they are sold, that in such Case he could not sell, and deliver the Money to the Party, because his Authority determined with his Office; but he ought to deliver such Money over to the new Sheriff, as he doth * the Prisoners, and return, that thereupon a *Venditioni exponas* may be awarded to the new Sheriff.

* P. 323

But

Simony.

But since it had been held, that though a new Sheriff is made, yet the old Sheriff may sell the Goods so by him levied; but if he return the Writ, that the Goods are in his Hands *pro defectu emptorum*, in such Case a *Distringas* shall go to him to deliver them over to the new Sheriff, and after that a *Venditioni exponas*. (5) 1 Vent. 319.

Where he levies Money upon a *Fieri facias*, the Plaintiff may have an Action of Debt against him for the Money, because it was received by him to the Plaintiff's Use, and the Defendant is discharged of it; and it lies against his Executors, if he die, for this is not like an Escape, which is a Wrong done by the Sheriff himself, but 'tis founded on a Duty due and owing by the Sheriff, which shall survive and charge his Executors. (6) Cro. Car. 539. Parkinson's Case. Where he levies Money by a *Fi. fa.* the Party may have an Action of Debt against him.

The King appointed a Sheriff, and afterwards a Barony descended on him by the Death of his Father, his Office doth not determine, but he continues Sheriff notwithstanding he is a Baron and Peer of the Realm. (7) 3 Cro. 13. Mordant's Case. His Office doth not determine by the Descent of a Barony.

Simony.

THIS is *studiosa voluntas emendi vel vendendi spiritualia, vel spiritualibus annexa*, and in the following Cases may be seen what is Simony, and what is not. (1)

In a Special Verdict in Ejectment, the Case was, an *Usurpation* was made, and a *Quare Impedit* brought against the Incumbent, and pending that Writ the Plaintiff sold the perpetual Advowson to W. R. and the Jury found, *that it was with Intention that H. C. should be presented after the Usurper was removed*, and accordingly he was presented, instituted and inducted; the Plaintiff supposing the Presentation to be void, got the King's Title, upon which he was admitted and inducted, and brought his Ejectment against the Defendant, and had Judgment; for *per Curiam*, the Defendant was in by Simony. (2) 2 Vent. 39. Pending a *Quare Impedit*, the Plaintiff sold the perpetual Advowson to W. with an Intention that H. should be presented, 'tis Simony. * P. 324

* In a *Quare Impedit*, the Plaintiff set forth the Statute against Simony, and that Thornden was a Benefice with Cure, which being void, a simoniacal Agreement was made with the Mother of the Patron, who was an Infant, and one Crew; that the Infant should present Crew, and that in Consideration thereof he should pay to her 250*l.* &c. The Defendant pleaded in Abatement, that he claimed nothing in the Benefice, but upon the Presentation of the Infant W. W. who is not named and made Defendant; and upon a Demurrer to this Plea it was adjudged, that where the Right of the Patron is not to be divested by the Judgment, there he need not be named in the Writ; now in this Case there was no Complaint against the Patron, for it was not he, but the Simonist, who is the Disturber, and therefore he need not be made a Defendant. (3) 31 Eliz. c. 6. 2 Lutw. The King v. Gibson. The Patron was an Infant and a simoniacal Agreement was made with his Mother, he (the Infant) need not be named in the *Quare Impedit*.

In the last Case the Statute against Simony is recited, but in the following Case 'tis not. (4)

§. In a *Quare Impedit* against the Ordinary, Patron, and Incumbent, to present to the Church, &c. setting forth, that 'tis a Benefice with Cure, &c. and that in 1681, it became void by the Death of the Incumbent, &c. then he sets forth, that during the Avoidance there was a simoniacal Agreement by which the present Incumbent was presented, &c. The Bishop pleads, that he claims nothing but as Ordinary; the Patron demurred to the Declaration, and the Incumbent pleaded, that he was *Parson Imparsoned*, upon the Presentation of the other Defendant, the Patron, and traversed the simoniacal Agreement; the Plaintiff replied, and prayed Judgment against the Ordinary, and took Issue upon the Traverse of Simony, and joined in Demurrer with the Patron; and it was objected against the Declaration, that the Statute against Simony was not recited therein, for so are all the Precedents: *Sed per Curiam non allocatur*. (5) 2 Lutw. The King v. Bishop of Chichester. *Quare Impedit* good, though the Statute against Simony is not recited.

Slander.

(5)
Sid. 329. Simony where
neither the Patron nor the
Clerk knew the giving
any Money.

Error to reverse a Judgment in a *Quare Impedit*, where the King had recovered upon a *simoniacal Agreement*, which was, that a Friend of the Clerk should give *W. R.* so much Money to procure him to be presented, and that he was presented *secundum Agreementum prædictum*; the Error assigned was, that neither the *Patron* or the *Clerk* knew any Thing of giving the Money: *Sed per Curiam*, he was *Simoniace promotus*, for being presented *secundum agreementum prædictum*, is a good Averment of a *simoniacal Promotion*.

(6)
3 Lev. 337. Where the In-
cumbent pleaded, that he
had no Notice of the cor-
rupt Agreement between
R. and the Grantee of the
next Avoidance to present
him.

* P. 325

In a *Quare Impedit*, the Plaintiff set forth, that he had granted the next Avoidance to *B.* that the Church became void: * and then he sets forth the Statute made against *Simony*, and during the Avoidance a corrupt Agreement was made between one *Richards* and the Grantee of the next Avoidance, that he should present one *Hide*, who was presented accordingly, which by Virtue of the Statute was void, &c. the Defendant *Hide* pleads with a *Protestation* to the Agreement, and that he had no Notice thereof; and upon a Demurrer to this Plea it was adjudged against the Incumbent *Hide*, because Notice in this Case is not material, by Reason of the Difficulty of proving it; 'tis the corrupt Agreement which makes the *Simony*, though the Incumbent might have no Notice of it.

(7)
Raym. 175. 3 Mod. 297.
Sid. 387 Debt upon Bond
conditioned to resign upon
Request, good.

Debt upon Bond, conditioned to resign upon Request; the Defendant pleads, that he did resign according to the Condition of the said Bond, upon which they were at Issue, and the Jury found for the Plaintiff; and upon a Writ of Error brought in *B. R.* it was assigned for Error, that this Bond was void, because it was made upon a *simoniacal Agreement*: *Sed per Curiam*, the Judgment was affirmed.

Slander.

(1)
In capital Offences action-
able. * Raym. 17.

CASE, &c. for these Words, * *Nuttal, who was Solomon Smith's Clerk, is a Knave and a Rogue, and I will prove it*, and he is in *Newgate* for Counterfeiting the King's Hand and Seal, and will be hanged for it, actionable.

(2)
Raym. 33.

Case for these Words, *Tbou hast stole our Bees* (*innuendo*, a Stock of Bees) and *Tbou art a Thief*; after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that Felony cannot be committed of *Bees*, because they are *Fera Naturæ*: *Sed per Curiam*, the subsequent Words, viz. *Tbou art a Thief*, shew, that the Stealing was of such *Bees* of which Felony may be committed, and so actionable.

(3)
1 Vent. 172.

* P. 326

Case, &c. He is a *Clipper and a Coiner*, after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that the Words did not charge the Plaintiff with *Clipping or Coining Money*, for they may be applied to many other Things; but adjudged * actionable, for it must be intended, that he meant *Clipping of Money*, and in that Sense 'tis usually understood.

(4)
In capital Offences not
actionable. 1 Vent. 213.

Case, &c. He picked my Pocket against my Will, he is a *Pick-pocket*, not actionable, because the Words do not imply, that he was guilty of Felony.

(5)
1 Vent. 325.

Case, He would have given *Dean Money* to rob *Golding's House*, and he did rob the House; after a Verdict for the Plaintiff it was insisted in Arrest of Judgment, that the first Part of the Sentence imports only an Inclination to rob, and the subsequent Words are relative to the first, for the Word *He* must refer to the last Antecedent, which was *Dean*, so no Charge on the Plaintiff: *Sed per Curiam*, the Words may be thus construed, that the Plaintiff gave *Dean Money* to rob the House, and he refusing, the Plaintiff himself robbed the House.

(6)
2 Vent. 172.

Case, &c. for these Words, *He broke my House like a Thief*; upon Not guilty pleaded, the Plaintiff had a Verdict: *Sed per Curiam*, in Arrest of Judgment, the Words are not actionable.

Case

Slander.

Cafe for these Words spoken of a *Broker*, and of his Profession, he is a *cheating Knave*, *he hath cheated me with Brass-Money*: *Per Curiam*, to call a *Tradefman* actionable. Raym: 62. (7) Words of Tradefmen

a *Cheat* generally, is not actionable, unless the Words are spoken of his *Trade*.

Cafe, &c. brought by a Merchant for these Words, there being a Communication of him, the Defendant said, I believe all is not well with *Daniel Vivian*, *there are many Merchants who have lately failed, and I expect no otherwise of Daniel Vivian*, actionable. Raym. 207. (8)

Cafe, &c. by a Mercer for these Words, *Thou art a cheating Knave and a Rogue*; after a Verdict for the Plaintiff, the Judgment was stayed, because there was no *Colloquium* laid of his *Trade*. Raym. 169. 1 Lev. 250. (9)

Cafe, &c. by a Merchant for these Words, *Austin Drake is broke, he is a beggarly Fellow, and not worth a Groat, and not able to pay his Debts*; after a Verdict for the Plaintiff it was moved, that the Words are not actionable, for he may be an honest Man, and not worth a Groat, and 'tis no Crime to be a beggarly Fellow, for it may be a Misfortune, and no Fault: But *per Curiam*, to say *he is not able to pay his Debts*, is actionable. Raym. 184. (10)

Cafe, in which the Plaintiff declared, that he is a *Keeper of a Livery-Stable*, and of *Bell-Savage Inn*, and that the Defendant had other Stables there, and that *W. R.* coming thither with a *Waggon*, inquired of the Defendant which was *Bell-Savage Inn*, who replied, *This is Bell-Savage Inn, deal not with Southam* (the Plaintiff) *for he is broke, and there is neither Entertainment for Man or Horse*; after a Verdict for the Plaintiff and great Damages, the Judgment was affirmed. Raym. 231. (11) * P. 327

Cafe, &c. in which the Plaintiff declared, that there being a Communication of his *Trade*, the Defendant said, *He is a cheating Knave, and keeps a false Book, with which he hath cheated the Country*, actionable, for though *cheating Knave* is not actionable, though a *Colloquium* was laid of his *Trade*, yet 'tis actionable to say *he keeps false Books*, for *Tradefmens Books* are often given in Evidence, therefore they must not be false. 1 Vent. 263. (12)

Cafe, &c. by a Draper for these Words, *You are a cheating Fellow, and keep a false Book*; the Plaintiff had a Judgment, but it was set aside, because he had not alledged any *Colloquium* of his *Trade*, for to say a Man is a *cheating Fellow*, it doth not follow that he is so in his *Trade*, for he may *cheat at Gaming*, and the Words being general, may as well be applied to that as to his *Trade*; and to keep a *false Book*, doth not imply that he kept a *false Debt-Book*, for he might keep a Book which is *false printed*. Words spoke of Tradefmen not actionable. 2 Saund. 307. (13)

Cafe, &c. for these Words spoken of a *Distiller*, wherein the Plaintiff declared, that he, discoursing with one *Iffes*, asked him of whom he bought *Aqua Vita*, who replied of *Mr. Godfrey* (the Plaintiff) then the Defendant said, *He is a Varlet, he hath suppressed his Brother's Will to cozen and deceive Men of their Legacies, I will make him cry Peccavi on his Knees*, &c. not actionable, because those Words do not relate to his *Trade*. Palm. 21. (14)

Cafe, &c. for these Words spoken of a *Merchant*, *You are a Cheating Rogue, and a Runagate Rogue*; after a Verdict for the Plaintiff, it was adjudged not actionable for to say generally, that a Man is a *Cheater*, is not actionable, unless there is a *Colloquium* of his *Trade* or Profession, which was not done in this Cafe. Hardr. 8. 2 Lev. 214. (15)

Cafe for these Words spoken of a *Watchmaker*, *He is a Bungler, and knows not how to make a good Piece of Work*; after a Verdict for the Plaintiff, adjudged not actionable, because the Words are indifferent, and have no Relation to his *Trade*; 'tis true, in this Cafe the Jury found that the Plaintiff was a *Watchmaker*; and if the Words had been, *he knows not how to make a good Watch*, it had been actionable. 1 Mod. 19. (16)

Cafe

Statute.

(17)

2 Lev. 233.
* P. 328

* Case, &c. for saying, that *she is as much a Man as I am, she is an Hermaphrodite*, spoken of a Woman who taught Girls to dance, not actionable; for 'tis no Scandal to her Profession to say, that she is an *Hermaphrodite*, because Men usually teach young Women to dance.

(18)

Words spoke of Men of Professions actionable. 2 Vent. 28. 1 Saund. 231.

Case, &c. in which the Plaintiff declared, that he was bred to the *Law*, and practised it, and that the Defendant wrote a Letter to *A. C.* his Client, that he (the Plaintiff) *would give vexatious and ill Counsel, and stir up a Suit, and would milk her Purse and fill his own large Pockets*; actionable by three Judges, *contra Vaughan Ch. Just.*

(19)

2 Vent. 172.

Case against an *Attorney* for these Words, *He is a Cheating Knave, and not fit to be an Attorney*; actionable, because saying, he was *not fit to be an Attorney*, shews that the preceding Words, (*viz.*) *Cheating Knave*, must necessarily refer to his Profession as an *Attorney*.

(20)

Raym. 196.

Case by an *Attorney*, in which he laid a *Colloquium of his Profession, and of him*, and that the Defendant said in the Hearing of several People, *Thou canst not read a Declaration*, by Reason whereof *T. P.* and *W. R.* who were formerly his Clients, deserted him: Upon Not guilty pleaded the Plaintiff had a Verdict, and upon a Motion in Arrest of Judgment, the Words were held actionable.

(21)

Words of Professions not actionable. Palm. 441. Poph. 177. Latch. 20.

Case, &c. for these Words spoken of an *Attorney of B. R.* *You are a Knave on Record, and a Forgery Knave*; not actionable, as reported by *Palmer*.

(22)

1 Lev. 250. Raym. 182.

Case, &c. In which the Plaintiff declared, that he is a *Mercer*, and that the Defendant spoke these Words, *Thou art a Cheating Knave, and a Rogue*; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that here was no *Colloquium laid of his Trade*, and for this Reason the Judgment was set aside. In ancient Times it was the constant Course to lay a *Colloquium* in Declarations for Words, and it was a Doubt whether it was good without it, till the Case of *Smith and Ward* in 2 *Cro.* but since that Case it hath been held sufficient to alledge, that the Words were spoken *de querente* and *de arte sua*, which Allegation shall supply the *Colloquium*.

† Raym. 86.

* P. 329

(1)

Hardr. 20. Where there is an Omission in the most material Part of a Statute, the Conclusion *contra formam Statuti*, will not help. *Postea* 11. S. P.

INFORMATION for importing *twenty Pottacos of Tobacco* in a Vessel not belonging to the People of this Nation, *contra formam Statuti*; after a Verdict for the Informer, the Judgment was set aside, because by the Statute the *Goods must belong to the People of this Nation*, and 'tis not averred that the *Tobacco* thus imported did belong to the People of this Nation, for 'tis that which makes the Forfeiture, and 'tis none if imported in a foreign Vessel, and by Foreigners; and the Conclusion *contra formam Statuti* will not help in this Case, because the Omission is in the most material Part of the Statute which creates the Offence, and which ought to be strictly pursued.

(2)

1 Vent. 13. Sid. 409. Where the Omission of *contra formam Statuti* will not hurt.

The Defendant was indicted for selling *Ale in black Pots* not marked, and this Indictment did not conclude *contra formam Statuti*. *Sed per Curiam*, 'tis good without such Conclusion, because the Common Law appoints, that all Measures should be just; therefore to sell less than Measure, is an Offence at Common Law, and this Circumstance of Marking the Measure is only added by the Statute.

(3)

3 Vent. 43. Where the Conclusion *contra formam Statuti* will hurt.

Information for a Riot, and concluded, *contra formam Statuti* 13 H. 4. after a Verdict for the Informer, it was moved in Arrest of Judgment, that the *Information* was ill, because it concluded *contra formam Statuti*, whereas the Statute doth not

Statute.

not make the Offence, but appoints Justices of the Peace, upon Complaint that there is a Riot, to view and record the same, and in what Manner to punish the Rioters. *Hale* Ch. Just. of Opinion, that this being an Offence at Common Law, and mentioned in this Statute, therefore the Information was well concluded *contra formam Statuti*; but the other Judges were against him.

Adjudged, that where an Offence is created by a Statute, which was not an Offence at Common Law, and if that Statute gives an Action to the Prosecutor, in such Case he must shew in his Declaration, that the Defendant is within all the Qualifications and Descriptions of that Statute, otherwise the Action will not lie; but where the Penalty is given to the King, 'tis sufficient to say *contra formam Statuti*. (4)
Sid. 303. Where an Offence is made by a Statute, and a Punishment or Action given to the Prosecutor, he must bring himself within the Qualifications of the Act.

* *Platt versus Hill*. Mich. 10 Will. 3. 1 *Ld. Raym.* 381. S. C. * P. 330

P E R Holt Ch. Just. Where the Plaintiff *misrecites a Private Act of Parliament*, and the Defendant demurs to the Declaration, Judgment shall be given for the Plaintiff, for it shall be taken to be as 'tis pleaded, because by the Demurrer 'tis confessed to be so; therefore, if the Defendant will take Advantage of a *Misrecital* of an Act of Parliament, he must plead *Nul tiel Record*, or alledge, that 'tis farther enacted so and so, &c. (5)
Holt 662. 12 Mod. 249. Where the Defendant will take Advantage of a Misrecital, he must not demur, but plead Nul tiel Record. See Postea 8. contra.

Flower versus Parker. Mich. 5 Annæ.

TH E Defendant was taken by Process of the Court of B. R. and now prayed the Benefit of being discharged upon *Common Bail*, according to the Statute for Discharging poor Prisoners, shewing the *Certificate* of the Gaoler, and the Adjudication of the Justices. *Et per Curiam*, the Justices have no Authority, unless the Defendant was actually in Custody on such a Day; for a bare Being within the Rules will not be sufficient, and this Court will examine the Truth of it, notwithstanding this *Certificate and Adjudication*. (6)
Justices, &c. have no Authority, if the Defendant was not in Custody such a Day.

Winter versus Price. Mich. 5 Annæ B. R.

TH E Defendant *Price* being indebted to *Winter* in a Bond of 180 *l.* conditioned to pay 90 *l.* and Interest on such a Day, was arrested, and discharged by the Justices, upon the Statute of Poor Prisoners, upon Common Bail. *Sed per Curiam*, There being 20 *l.* due for Interest at the Time that Statute was made, by Consequence he owed at that Time more than 100 *l.* and therefore the Justices could not lawfully discharge him; so their Order was made void. (7)
Justices cannot discharge a Prisoner, if he owes more than 100 *l.* to one Man.

In *Platt and Hill's* Case before mentioned, it was held, *per Holt* Ch. Just. That if a Man *misrecites a General Statute*, the other Side cannot plead *Nul tiel Record*, but must demur: and then if the *Misrecital* was of Substance, and the Party upon reciting it concludes *Vigore Statuti predicti*, or *contra formam Statuti predicti*, 'tis naught; but if he conclude *contra formam Statuti in hujusmodi casu editi*, or the like, 'tis good. (8)
Antea 5. Where a Man misrecites a general Statute, the other Side must demur, but not if he misrecites a private Statute.

* 'Tis a safe Way in Pleading to set out, that a Parliament was held generally in such a Year of the King, without descending to Particulars, as to the Day and Month; as for Instance, *Actio non quia dicit quod in Statuto in Parlamento Domini Willielmi nuper Regis Angliæ tertii apud Westm' Anno Regni sui nono tenet edit' inter alia Ordinatum fuit auctoritate ejusdem quod, &c.* (9)
Saund. 5. The Form of Pleading a Statute. * P. 331

Mills versus Wilkins. Mich. 2 Annæ.

IN *Trespass* for taking several *Skins*; the Defendant justified under the Statute 1 *Jac. 1. cap. 12.* intituled an Act, &c. but mistook one Word in the Title; and upon a Demurrer to this Plea it was urged, that the Title is no Part of the Act, and that by the Opinion of * *Hale Ch. Baron*, an Act of Parliament may (10)
Salk. 609. S. C. Where the Mistake was in the Title of the Act recited. * Hard. 324.

Suit of Court and Services.

be good without a Title: *Sed per Holt* Chief Justice, though the Title is no Part of the Act, no more than the Preamble, or the Title of a Book is Part of a Book; yet where the Justification is tied to the Act described, and if there is no such Act the Justification must be ill; 'tis true, in Pleading 'tis not necessary to set forth the Title of the Act, for 'tis sufficient generally to say, *quod inactitatum fuit*; but if a Title is set forth, 'tis better to do it in *Latin* than in *English*, Judgment was given for the Plaintiff.

(11)
Hard. 105. Where the Conclusion contra formam Statuti will not help. Antea 1. S. P.

Information on the Statute 35 H. 8. cap. 17. for grubbing up Wood *contra formam Statuti*, &c. after a Verdict for the Plaintiff it was objected in Arrest of Judgment, that this Information was not good, because it did not set forth, that the Wood was *growing at the Time of the Act made*; as upon the Statute 5 Eliz. for exercising a Trade, not being an *Apprentice* to it for seven Years; it must be alledged, that it was a Trade used at the Time of that Act made, and for this Reason the Judgment was set aside; 'tis true, this Information concludes *contra formam Statuti*, but that will not help, because those Words are no Part of the Case, they are only a Conclusion upon the Premises insufficiently set forth.

* P. 332

* Suit of Court and Services.

(1)
Of Suit Real and Suit Service.

T H E R E are two Sorts of Suits, (*viz.*) *Suit Real* and *Suit Service*; the first is by Common Law and of Common Right, for 'tis that Attendance which Men owe to *Tourns* and to *County Courts*, and the Law obliges them to this Service, in respect of their Commorancy, that there may be no Want of *Jurors* to do the Business of those Courts; therefore he who makes Default and doth not appear there, is to be amerced; the *Nobility* are excused by the Statute of *Marlbridge*, cap. 10. now by the Statute of *Merton* cap. 10. a Man may do this Suit by *Attorney*; but if the *Sheriff's Tourn* is held out of the Hundred where the Party lives, then, in such Case he is excused by the Statute of *Marlbridge* aforesaid.

(2)
Suit Service is due by Reservation.

Suit Service is in respect of the *Tenure*, and 'tis due by *Reservation*, therefore; for this as well as for all other Services by which Lands are held, the Lord may *distrain*, if there is a Default in the Tenant; and as *Suit Real* is due to such Courts which are of publick Institution, (*viz.*) to the *County Courts* and *Tourns*, so this *Suit Service* is due to the Courts of *private Persons*, as to *Courts-Baron* of particular Lords of Manors; and though the Suitors are Judges, yet they may do their Services by *Attorney*.

(3)
2 Lutw. 1366.

In *Trespas*, the Defendant pleads, that his Father being seised of certain Lands, demised them by Indenture to *A. habendum* to him and to his Executors and Assigns for ninety-nine Years, if the said *A.* and *B.* should so long live; *reddendum*, after the Death of the said *A.* and *B.* his or their best Beast, or 40 s. in Lieu thereof: Proviso, that no *Heriot* shall be paid upon the Death of *B.* living *A.* then *A.* died, and afterwards *B.* died, whereupon the Plaintiff having the Reversion by Descent, distrained a *Gelding*; but in the Pleading it did not appear, that the Distress was taken on the Premises: *Et per Curiam*, this is a *Heriot Service*, being reserved upon a Lease, and in that Case, there being a Reversion, this is a Service incident to it, and therefore must be reserved payable during the Term; but where a *Tenant in Fee* holds of his Lord by *Heriot Service*, such Service is incident to the *Tenure*, which is ancient, and must be supposed to be before the Statute *Quia emptores*, &c. and these are seisable by the Lord, either on, or out of the Lands; * but this being a *Heriot Service* by Reservation, and not due till *post mortem*. *A.* there can be no Reversion when it became due.

* P. 333

Superfedeas.

WHERE a *Writ of Error* is returnable in Parliament *Teste* after the *Prorogation*, and a whole Term intervene between the *Teste* and *Return*, 'tis no *Superfedeas*; but 'tis otherwise if a less Time intervene, or if the *Writ of Error* be returned before the *Prorogation*. (1) 1 Vent. 266. Where a *Writ of Error* in Parliament is no *Superfedeas*.

Writ of Error upon a Judgment in *B. R.* taken out, and *Teste* 1 *Novemb.* Ibidem. (2) returnable 1 *November prox.*, and a *Mittimus* indorsed on the Roll, in *B. R.* it was held, that the Record still remained in *B. R.* to all Purposes, and that Execution might be taken out, for the *Writ of Error* was no *Superfedeas*.

Writ of Error in the *Exchequer-Chamber*, upon a Judgment in *B. R.* and *Error in Fact* assigned, which not being assignable there, that Court affirmed the Judgment of *B. R.* and the Record of Affirmation being transmitted into *B. R.* the Plaintiff brought another *Writ of Error* there *coram vobis residen*, and moved, that upon putting in Bail it might be a *Superfedeas* to the Execution: *Sed per Curiam*, it was not allowed, because the Judgment being affirmed in the *Exchequer-Chamber*, *transit in rem judicatam*. (3) 1 Vent. 107. 2 Lev. 38. *Writ of Error coram vobis residen* is no *Superfedeas*.

Judgment against *W. R.* in *B. R.* and a *Writ of Error* brought in the *Exchequer-Chamber*; afterwards the Plaintiff brought an Action of Debt on that Judgment, and the Defendant pleaded *Nul tiel Record*; and upon a Demurrer this was adjudged an ill Plea, because the *Writ of Error* is no *Superfedeas* to the Action of Debt on the Judgment, but only to the Execution upon that Judgment; besides, the Record is not removed by the *Writ of Error*, but only the Transcript. (4) Sid. 236, Raym. 100. 1 Lev. 153. 1 Vent. 34. *Writ of Error* in the *Exchequer Chamber* is no *Superfedeas* to an Action of Debt on a Judgment in *B. R.*

Adjudged, that where a *Writ of Error* is not shewn to the other Party, or allowed by the Clerk, by his indorsing *Recepi* upon it within four Days (which is allowed as a convenient Time for putting in Bail, according to the Statute) 'tis no *Superfedeas*; * likewise, if before the *Writ of Error* allowed, the Sheriff returns *Fieri Feci*, or *Non inveni emptores*, that in such Case the Execution shall not be set aside. (5) 1 Vent. 255. Where a *Writ of Error* is no *Superfedeas*. * P. 334.

Superstitious Use.

AL L Superstitious Uses are void, and given to the King by the Statute * of Ed. 6. which extends only to such Uses as were made before that Time, so that all Superstitious Uses since that Statute was made, though they are void, yet they are not forfeited to the King. (1) 1 Ed. 6. cap. 14.

Whatever Use is devised or given to any Person or Company, and which is not a charitable or good Use in the Eye of the Common Law, or within the Statute 43 *Eliz.* seems to be a void Use, and of no Effect within the Statute 23 *H. 8.* (2) 1 Rep. Porter's Case. 43 *Eliz.* cap. 4. 23 *H. 8.* cap. 10.

The King and Queen *versus* Portington & al'. Mich. 4 Will. 3. B. R.

IN Ejectment by the Heir at Law against the Devisee, the Case upon Evidence was, that the Defendants were *Roman Catholics*, and that one of them did recommend such a Priest to be Confessor to the Testatrix, who persuaded her she could not be saved, unless she devised her Estate to God and his Saints, and that the Defendant was an *Abbeys* in France, and joining with the Confessor in the same delusive Persuasions, prevailed with the Testatrix to devise her Estate to her, and (3) 1 Salk. 162. S. C. Where an Averment will not be allowed to defeat a Will.

Tail.

and this was urged to be Evidence of a Superstitious Use ; but the Court was of Opinion, that this being an absolute Devise, and no *Trust* declared or appearing upon the Face of the Will itself, no such *Averment* could be made or admitted, for if the Law will not allow an *Averment* to supply a Will, *a fortiori*, there can be none to defeat it : *Et per Holt* Ch. Just. The Stat. 23 H. 8. makes such Uses void, but doth not give them to the King, and the Statute 1 Ed. 6. gives them to the King, but doth not extend to future Uses made after that Statute ; and that it might be convenient for the Heir at Law to seek his Remedy in Parliament, according to the Case in *Moor* 784. *quod vide*.

* P. 335

(4)
2 Sid. 13, 34, 46. Where
a Limitation is to a Super-
stitious Use.

* Feoffment to the Use of his Last Will, then the Testator devised his Lands to the Dean of Newark for an *obit*, and the Residue to pay a Chantry Priest 7 l. per Annum during the Life of his Wife, and of his Sister Edith, to chant for his Soul, &c. and after the Death of his Wife and Sister, then to perform Divine Service for 99 Years, and afterwards to be sold, and the Money to be distributed to charitable Uses for the *aforesaid* Souls. The Feoffees made a Feoffment accordingly for 99 Years, rendering 7 l. per Annum to the Chantry Priest ; then came the Statute 1 Ed. 6. concerning Chantries, and the Question was, whether the Fee-simple or the Lease only was forfeited to the King ? *Et per Curiam*, The Fee-simple is forfeited ; for by the first Feoffment and the Will all was limited to Superstitious Uses.

Tail.

Of Estates-tail, and of Leases, &c. made by Tenants in Tail.

Simonds *versus* Cudmore. Hill. 1 Will. 3. Rot. 743.

(1)
† 1 Salk. 338. Where a
Lease made by the Tenant
in Tail, shall bind the
Issue.

THIS Case is reported in † 1 Salk. but more clearly here, (*viz.*) A. was Tenant for ten Years in Possession ; the Remainder was to B. in Tail, who had likewise the Reversion in Fee expectant, upon the Determination of the Lease for ten Years, and being seised of both these Estates, he made a Lease for Years to commence at a Day to come ; but before that Day came he died ; then the Issue in Tail levied a Fine, and declared the Uses thereof to himself and his Heirs ; the Lease for ten Years expired, and then the Future Lessee entered, and was in Possession by Virtue of the Lease made to him by the Tenant in * Tail, upon whom the Issue in Tail entered, and the Question was, whether he was bound by this Future Lease.

* P. 336

In arguing this Case it was held, that where Tenant in Tail makes a Lease to commence *in presenti*, 'tis voidable by his Death ; but if he makes it to commence *in futuro* (as in this Case he had done) (*viz.*) If it be to commence after his Death, 'tis void, because 'tis not derived out of his own Estate and Possession, but out of the Estate of the Issue in Tail, which is paramount *per formam doni* ; so if Tenant in Tail makes a Lease to commence at a Day to come, and dies before the Day come, the Lease is void, and the Lessee is a Trespasser if he enter, because the Lessee had no Estate or Interest in the Land, but only an *Interesse Termini* till actual Entry, and the Issue in Tail had a Title paramount and precedent to that of the Lessee, which cannot be avoided. But *per Curiam*, in the Principal Case the Lease is not void but voidable by the Issue in Tail, and that only in Respect of the Estate-tail ; and therefore since this Lease issued out of all the Interest and Estates which the Lessor had, (*viz.*) as well out of the Reversion in Fee, as the Estate-tail, and since the Estate-tail is now extinguished by this Fine, which hath now turned all into an entire Fee-simple, it hath thereby made the Estate unavoidably subject to this Lease.

Lord

Tail.

Lord Offulston's Case. Mich. 7 Annæ.

FORD being seised in Fee, and having Issue three Sons and a Daughter, and having likewise one Brother, devised his Lands to his eldest Son in Tail-Male, and so to the Second and Third Son, Remainder to his own Right Heirs Male for ever; the three Sons died without Issue, and the Question was, whether the Daughter, as Heir General, or the Brother of the Testator, as Heir Male, should have the Lands. *Et per Curiam*, none shall take by those Words *Heirs Males*, but he who is Heir Male of the Body of the Testator, for no collateral Heir Male shall take by such a Limitation by way of Remainder; for at Common Law, if Land was given by a common Conveyance to one and his Heirs Males, there the Word *Males* shall be rejected, for there was no such Thing as an Heir Male, without saying of whose Body; and if by Letters Patents Lands were limited to *W. R.* and his Heirs Male, 'tis void, though 'tis otherwise in a Will; and the Reason is, because in a Will the Law supplies those Words, *of his Body*, and that makes it a Devise to him and the Heirs Males of his Body, for Heirs or Heir Male cannot be a Name of Purchase, but Heirs Males of his Body may: Therefore, if there is no such Thing in Propriety of Speech as * an Heir Male, without saying of whose Body, for that Reason Heir Male of his Body, or Heirs Males of itself, where the Law will supply these Words, *of his Body*, as it will in a Devise, may be a good Name of Purchase; but yet the Party who would take by such a Limitation must be such a Person as may be an Heir by the Common Law, and would take by that Name.

(2)
Devise of a Remainder to his Right Heirs Male must be intended Right Heirs Males of his Body.

* P. 337
See *Counden v. Clerke*, and *Pibus v. Mitford*.

Lee versus Brace. Mich. 8 Will. 3. B. R. 1 Ld. Raym. 101. S. C. Carth. 343. S. C.

A Feoffment was made to the Use of the Feoffor for Life, Remainder to *W. R.* his Son and his Heirs, and for Want of Issue of him, then to the Right Heirs of the Feoffor: Mr. *Northey* objected, that though this would have been an Estate-tail in *W. R.* by a Will, yet the Authorities which prove it to be so, do likewise prove, that it would be otherwise in a Deed, as in this Case. *Sed per Holt Ch. Just. non allocatur*, for this is but one entire Sentence of Limitation, the Intent whereof is very plain, and the Rule of Law is only, that an Estate of Inheritance cannot pass without Words of Inheritance; but there is no Rule in Law, that Words of Inheritance may not be qualified or abridged by subsequent Words; therefore in this Case *W. R.* hath only an Estate-tail, though by Deed, it being in one Sentence; for though the first Words of that Sentence, (*viz.*) to his Son and his Heirs, make a Fee-simple, yet the subsequent Words, (*viz.*) and for Want of Issue of him, make an Estate-tail, by qualifying and abridging the first Words, and in creating Entails, *voluntas donatoris observanda est*.

(3)
Feoffment to the Use of his Son and his Heirs, and for Want of Issue of him, Remainder over is an Estate-tail.

In a Special Verdict in Ejectment, the Case was; the Father being seised in Fee, had Issue *Robert* by the first Venter, and *Ralph* and *Jane* by the second Venter, and he covenanted to stand seised to the Use of himself for Life, Remainder to Trustees, to several Purposes, Remainder to *Jane* for Life, Remainder to *Ralph*, and the Heirs Males of his Body, and of his Lands in *W.* (being the Lands now in Question) to the Use of his Heirs Males begotten on the Body of his second Wife; the Father died, and the Question was, whether by this Limitation any Use did arise to *Ralph*, who was his Heir Male by the second Wife? and adjudged that it did, because his Father had an Estate for Life in these Lands in *W.* not by express Limitation, but by Operation of Law, which being united to the Estate limited to the Heirs Males of his Body, makes an Estate-tail; now this being in a Covenant to stand seised, and no Transmutation of Possession, (as it was in *Greswold's Case*) so much of the old Use which was not disposed of by the Covenantor, still remains in him, for there is nothing to take it out of him, (and so is *Counden and Clerke's Case*, * and *Bingham's Case*) so that the old Use being still in the Father, who was the Covenantor, this Estate for Life shall be raised in him by Implication of Law, to preserve and support this Limitation, (*viz.*) To the Heirs Males of his Body, so that this is an Estate-tail executed in him, and

(4)
2 Lev. 75. Raym. 228, 159, 273. 2 Mod. 207. 1 Mod. 121, 159. Sid. 98. Where an Estate for Life shall be raised by Implication and united to a Limitation of the Lands to the Use of his Heirs Males begotten of his Body, so as to make an Estate-tail executed in himself.

* P. 338

Tales. Taxes.

and by Consequence after his Death it shall be to *Ralph* his Son, as a *contingent Remainder*.

(5)
Raym. 127. Where an
Estate-tail is executed,
and where the Remainder
is not contingent.

By a Marriage Settlement and *Fine* levied, &c. to the Use of Husband and Wife, for their joint Lives, Remainder to the *Heirs of the Body of the Wife* by the Husband to be begotten, Remainder, (the Wife surviving the Husband) to her for Life, Remainder to the Right Heirs of the Husband ; *per Curiam*, this is an Estate-tail executed in the Wife, it cannot be a contingent Remainder, because that never is but in Cases where the particular Estate may determine before the Contingency happens.

Tales.

Cook's Trial. fol. 12, 13, 14, 15.

(1)
Where the Jury is sum-
moned to try a particular
Issue, there may be a Tales,
where not.

AT the Sessions of Gaol Delivery for the Trial of *Cook* for *High Treason*, the Court could not have a full Jury by Reason of Defaulters, and the many challenged by the Prisoner, whereupon the Court adjourned to another Day, and ordered another Panel to be then ready ; it was objected, that there ought to be a *Tales*, and an *Habeas Corpora*, to complete the Number of *nine Jurors*, who were already sworn, for otherwise this Record would be left imperfect. *Et per Curiam*, Wherever the Jury is summoned by a *Venire facias* to try a particular Issue, there may be a *Tales*, because there is a Writ upon which it may be grounded ; but where there is no *Venire facias* 'tis otherwise ; for there can be no *Tales* but with an *Habeas Corpora* to bring in the first Jurors : Therefore in the Case of *Oyer and Terminer*, though perhaps there may be such a Course, yet in Commissions of Gaol-Delivery it cannot be ; and 'tis very plain that 'tis not necessary ; for in such Cases the Course is for the Justices * before they come to Court, to send a written Precept to the Sheriff generally, to return Jurors against their coming in order to deliver the Gaol ; and out of those Panels the Jury is called, and without any Writ or Precept in Writing, and the Entry is no more than thus, (*viz.*) that *W. R.* the Prisoner, pleaded Not guilty, *Ideo immediate veniat inde Jurata*, and this is always before Issue joined, and therefore 'tis never to try a particular Issue ; and in this respect the Proceedings of *Oyer and Terminer* differ, that they do not send a general Precept to the Sheriff before Issue joined, but a particular Precept after Issue joined, to summon a Jury to try a particular Issue, so that this is a Precept in Nature of a *Venire facias*, upon which Account, perhaps a *Tales* may be grantable : But here it is otherwise, because there is neither a particular *Venire facias*, or Precept in the Nature of one.

* P. 339

(2)
1 Lev. 223. A *Tales* is ne-
ver awarded on an Indict-
ment, unless there is a
Warrant from the Attor-
ney-General.

A *Tales* is never awarded upon an *Indictment*, unless by Warrant from the *Attorney-General*, but 'tis awarded upon an Information *qui tam*, &c. because of the Interest which the Prosecutor hath in such Prosecutions.

Taxes.

(1)
Grand Customs.

* Cap. 30.

THE grand Custom of a *Mark* and *Demi-mark* on *Woolfels* and *Leather*, and also *Prisage*, (*i. e.*) one Tun of Wine before the Mast, and one Tun behind the Mast of every tenth Tun, were due to the King by Common Law, and these are implied by the Words * *reclæ & antiquæ consuetudines in Magna Charta*, but Petty Customs, or *parvæ Custumæ*, begun *Anno* * 31 *Ed. 1.* and were made perpetual by 27 *Ed. 3. cap. 26.*

(2)
Tonnage and Poundage.

Tonnage and Poundage is by an Act of Parliament, and was never granted for any longer Time than for one or two Years, till the 31 *Hen. 6.* when it was granted

Taxes.

granted to that King for Life ; and not only for the *ordinary Defence of the Sea*, but that the King might have a Stock of Money always ready for that Purpose, &c.

* Brewster *versus* Kidgell. Hill. 9 Will. 3. B. R. 1 Ld. Raym. 317. * P. 340
S. C.

(3)
THIS Case is reported in 1 Salk. but more clearly, and yet more at large, 1 Salk. 198. S. C. Of
as followeth, (*viz.*) It was a feigned Action upon a *Wager*, in which the Taxes, Subsidies, and
Question was, whether the Plaintiff might deduct 4 s. in the Pound, being so Assessments.
much charged on the Lands by the Statute 4 & 5 Will. 3. and Power given to
deduct it, with a Proviso not to alter any Covenants or Agreements between the
Parties.

The Jury found, that *R. Langford* being seised in Fee of these Lands, did, in the Year 1649, grant a *Rent-charge* of 40 l. *per Annum*, issuing out of the same to the *Grantee and her Heirs*, and on the Back of this Deed there was this *Memorandum* indorsed, (*viz.*) *That it is the true Intent and Meaning of these Presents, that the Grantee and her Heirs should be paid the said Rent-charge, without Deduction for any Taxes for the Rent or Lands therewith charged ; and afterwards by another Deed he covenanted to pay it, free from all Taxes : Et per Holt Ch. Just.*

The Word *Taxes* generally spoken, with Reference to any Freehold, or where the Subject Matter will bear such Reference, shall be intended * *Parliamentary*, and this *propter excellentiam* ; but there are other Taxes not *Parliamentary*, such as are * 34 H. 8. Quinzefme 9.
for repairing Churches, Taxes imposed by Commissioners of Sewers ; and generally any † Imposition which takes away Part of a Man's Goods or Rent, may properly be called a Tax. † 2 Inst. 532.

The ancient Way of *Taxing* was by *Tenths and Fifteenths*, then by *Subsidies*, afterwards by *Royal Aids*, and at last by a *Pound Rate*, the former were all upon the Person and the personal Estate, and were much the same, but the last was upon *Lands and Rents*.

Anno 18 Ed. 3. a Valuation was made of all the *Towns in England*, and returned into the Exchequer, and this became the standing Rule for Taxing every Town, (*viz.*) when a *Tax* was given, the Officers of the Exchequer presently 2 Inst. 76, 77.
knew to how much it amounted for every Town, and the Inhabitants taxed the 11 H. 4. 35, 36. Br.
Landholders and Occupiers of Lands, and they were charged and paid their Pro- Quinzefme 9.
portion, though they held at a Rack-Rent.

The first *Subsidy* was granted *Anno* * 32 H. 8. and this was a Tax upon the Per- * Cap. 50.
son, both for his *Lands and Goods*, and payable by him where he lived, and this continued till the 15th Year of *Car. 1.*

About two Years afterwards, (*viz.*) *Anno* 17 Car. 1. the first *Assessment* was made upon Lands and Rent, according to a *Pound-Rate* ; and by this and other Statutes there was a Clause for the Tenant to deduct the *Taxes*, and so it was in in the Years * 1642, 1644, 1659, and when by the Agreement of the Parties * P. 341
the *Taxes* were not to be deducted, there was usually a Clause in all Deeds for that Purpose, as it was in this Deed, and at that Time that there should be no Deduction for Taxes ; so that if this Covenant or *Memorandum* had been made in the Year 1640, it would not have extended to those Taxes, because there were no such then in Being or known in the Law, and therefore could not have been foreseen by the Grantee, without a prophetick Spirit ; but being frequent and in Use when this Deed was made, he must intend that the Rent-charge should be free from these Taxes, otherwise he intended nothing by this *Memorandum* and the other Deed.

(4)
The Defendants were indicted for a Misdemeanor, for that being Assessors and Mod. Cases 306. Assessors
Collectors of the publick Taxes in such a Parish, they assessed some too high, of Taxes indicted for a
and omitted others, and yet they levied the Money on those who were omitted, Misdemeanor,
and converted it to their own Use, for that their Names were not set down in their Books ; and being convicted, and coming now to receive Judgment, it was moved, that no corporal Punishment might be inflicted on them, because the Crime was not of an infamous Nature : *Sed per Curiam*, they were adjudged to the

Tender.

the Pillory in the County where the Crime was committed, and that the Marshal should carry them down and a Writ should go to the Sheriff to assist him in the Execution of this Sentence.

Tender.

(1)
Sid. 13. Refusal, where
traversable. Sid. 364.

2 Vent. 109.

W H E R E a *Tender and Refusal* is pleaded, 'tis the Refusal which is traversable, and not the Tender; for 'tis that makes it a Payment in Law and not the Tender; and wherever the Demand is certain, or a certain Sum claimed in the Declaration, there a *Tender and Refusal* is a good Plea, and a Tender is not well pleaded without a *Refusal*.

(2)
2 Vent. 107. Where a
Tender is pleaded without
a Refusal to accept, 'tis
not good, unless a certain
Place of Payment is ap-
pointed.

* P. 342

Debt upon Bond conditioned to pay 12*l.* on the 15*th* of Aug. and on the 15*th* of Feb. by equal Portions; the Defendant pleaded, that on the 15*th* of August there was 6*l. due*, which on that very Day at B. *obtulit solvere*, and was ever after * ready to pay; and afterwards, (*viz.*) on the 15*th* Day of December, he did pay it to the Plaintiff, who accepted it; and upon a Demurrer to this Plea it was adjudged ill, because the Defendant pleaded a Tender without a Refusal to accept, and his accepting it afterwards will not help; 'tis true, if there had been a certain Place of Payment mentioned in the Condition of this Bond, and the Defendant had shewed that the Plaintiff was not there ready to receive it, this might be good, but here was no *certain Place* appointed.

(3)
2 Lev. 209. Where the
Time and Place is certain,
semper paratus is not a
good Plea, without alledg-
ing *obtulit se solvere*.

In Debt for Rent, the Defendant pleaded in Bar, that he *paratus fuit* at the Day and Place, &c. to pay it, and that ever since he hath been ready, & *profert hic in Curia* the Rent, and so *petit judicium de damnis*; and upon Demurrer to this Plea it was objected, that it was ill, because the *Time and Place of Payment being certain*, 'tis not good to say *semper paratus fuit*, without alledging, that *obtulit se solvere*, and adjudged accordingly.

(4)
Raym. 418. Where sem-
per paratus is a good Plea
without a Tender.

Debt for Rent, the Defendant pleaded, that he was at the House on the Day, &c. for an Hour *before Sun-set*, and staid there on the same Day till Sun-set, ready to pay the Rent, and that no Body was there to receive it; and that since that Day he always was, and yet is ready to pay the same, & *denarios illos idem defendens hic in Curia profert parat fore solvend' eidem* (the Plaintiff) *si illos de eodem* (the Defendant) *accipere velit & hoc*, &c. And upon a Demurrer to this Plea it was objected, that the Defendant did not plead a *Tender* at the Day, but only that he was then ready to pay the Rent: *Sed per Curiam*, the Plea is good without a *Tender*, but it had not been so in an Action of Debt on a Bond, for there a *Tender* must be set forth to save the Breach of the Condition.

Lancashire *versus* Killingworth. Trin. 13 Will. 3. B. R. 1 Ld.
Raym. 686. S. C. Comyns 116. S. C.

(5)
12 Mod. 530, 533.
2 Salk. 623. S. C. Where
the Place and Time are
certain, it must be set
forth in the Pleading at
what Time he came, and
how long he staid.

* P. 243

T H E R E is a short Note of this Case reported in 2 Salk. by the Name of *Lancashire versus Killegrew*, but the Case was thus: *ff. In Covenant*, the Plaintiff declared, that the Defendant's Testator covenanted with the Plaintiff, upon two Days Notice, at any Time within one Year, to accept 1000*l.* joint Stock of the *Hudson's Bay Company*, at the *Hudson's Bay House*; and that upon the Transfer thereof he would pay the Plaintiff 2000*l.* the Plaintiff avers, that on the second Day of Novemb. &c. he gave Notice to the Defendant to come on the * fourth Day of November, (which was within the Year) to the *Hudson's Bay House*, and then there to accept the Transfer of 1000*l.* Stock, and that the Plaintiff was ready there, and offered to transfer it, but the Defendant did not accept it, neither had he paid the 2000*l.* Upon a Demurrer to this Declaration, Holt Chief Justice, held, that if the Tender had been well set forth, the Plaintiff would have a good Title to the 2000*l.* for if he hath done all which he can do, in order to accomplish what he had agreed to do, 'tis as effectual and sufficient as if he

Tenor. Term and Vacation.

he had actually transferred the Stock. But here the *Tender* is not well pleaded; for where 'tis pleaded at *the Place appointed*, as in this Case it was at *the Hudson's Bay House*, and no one there to accept the Transfer, he ought to shew, *at what Time he was there on that Day, and how long he staid*, for he ought to shew that he had done his utmost Endeavour to accomplish his * Agreement; 'tis true, he need not set forth, that neither the Defendant, nor any Body else in his Behalf, was there, because it shall not be intended that another was there for him; but if the Truth was so, it must be set forth on the other Side: Now as to the *Time*, 'tis the last Time of the Day which the Law appoints for a *Tender*, but yet not so late in the Day, but that there may be Time enough for the Execution of the Agreement in what is tendered: Now in the Principal Case, the Stock can never be transferred, but when the Company's House is open, and that is usually at set Hours, as at ten of the Clock in the Morning; therefore the Plaintiff should have set forth and averred the Usage of the Company, and that he came at the proper Time, and staid there till after the House was shut.

Giles *versus* Hart. Mich. 9 Will. 3. 1 Ld. Raym. 254. Carth. 413. S. C.

THIS Case is reported in 2 Salk. (which see there) to which may be added the Opinion of the Chief Justice Holt in this Case, (*viz*) In an *Indebitatus Assumpsit* for Wares sold and delivered; the Defendant pleaded a *Tender* on such a Day, and that he hath been ready ever since to pay, &c. and upon Demurrer to this Plea he held, that where an Action of Debt is brought upon a Bond conditioned to pay a certain Sum on a certain Day, there a *Tender* at the Day, and that he hath been ready ever since to pay, is a good Plea; but 'tis not so in *Assumpsit*; for though he might be ready to pay ever since the *Tender*, yet that being after the Promise made, and probably after it was demanded to be paid, 'tis not good, for it not being paid, the Promise is broken, so 'tis likewise in Debt upon a single Bill; therefore in these Cases the Defendant must plead *semper paratus*: He held, that in an Action of Debt *Tender and Refusal* might * be pleaded in Bar of the *Damages*, but not in Bar of the *Action*, for the Debt still remains: That in *Assumpsit* a *Tender* likewise might be pleaded in Bar of the *Damages*; but of this there hath been some Doubt; for he held, that in such Case the whole Demand being in *Damages*, a Plea in Bar to the *Damages* goes in Bar to the *Action*; therefore he said he should favour any Course to help a Defendant in such Case, as by allowing him to bring a Sum of Money into Court, and praying Judgment, *de ulterioribus damnis*, or by confessing *Damages* to so much, which he is ready to pay, and pray that the Plaintiff may proceed at his Peril.

Horne *versus* Lewin. Trin. 1699. B. R. 1 Ld. Raym. 639. S. C.

IN *Avowry for Rent*, the Plaintiff replied, that he was ready upon the Land on the Day of Payment till *Sun-set*, and no one was there to receive the Money, and that he is still ready to pay it, and so *petit judicium & damna*, this was adjudged naught; but if it had been *petit judicium de damnis*, it had been good, for his being ready to pay excuses the *Damages*, but doth not bar the other of his Rent.

Tenor. See Libel, 2.

* Term and Vacation.

* P. 345

A Recovery was suffered on the first Day of *Michaelmas Term*, about eleven of the Clock in the Morning, and the Recoveror died in the same Morning about two Hours before; yet this was adjudged good, for the Writ was returnable three Days before, and the Judgment shall relate to that Day.

Time. Tithes.

(2)
1 Cro. 102.

The *Essoin-Day* is the first Day of every Term in Respect to legal Proceedings, and Judgments shall relate to that Day, and not to the *quarto die post*; but if a Man is bound to appear, or to pay the Money on the first Day of the Term, *tunc loquimur ut vulgus*, and then the *quarto die post* is the first Day.

(3)
2 Cro. 16.

St. John's Day, *non est Dies Juridicus*, and therefore the Judges never sit on that Day, unless it happens to be the *first Day of the Term*.

(4)
1 Roll. Rep. 29.

If the next *Friday* after *Corpus Christi* Day, happen to be on *Midsummer-Day*, yet that must be a *Hall-Day*, though otherwise it would not, for the *Friday* next after *Corpus Christi* is appointed by the Statute to be the first Day of *Trinity-Term*; and if this be not reckoned, the Term would not begin till *Friday* in the next Week following,

* P. 346

* **Time.** See Issues joined, 1.

Scott *versus* Hogson. Trin. 11 Will. 3. B. R.

(1)
Assumpsit to run a Horse at such a Time as the Plaintiff shall appoint, and he sets forth that he appointed such a Day, good.

A S S U M P S I T to run a Horse at *such Time* and Place as the Plaintiff should appoint, and the Plaintiff declares, that he did appoint *such a Day*; it was doubted, whether this was appointing a *Time*, which is more certain and determinate than a *Day*: But *per Curiam*, by appointing a Day the Law will supply the Rest, and fix it to the most usual and *convenient Time* of that Day.

Davy *versus* Salter. Mich. 3 Annæ. B. R.

(2)
Mod. Cases, 230.

* 1 Cro. 275. Jones
300. 1 Roll. Abr. 595.
Yelv. 140.
† 1 Cro. 11. 2 Cro. 16.

A Writ of Inquiry was executed in *tres septimanas Trin.* (which was on *Sunday* the 13th Day of *June*) and the Writ was returned to be executed on the 14th Day; and upon a Writ of Error brought it was insisted, that the Court could not take Notice of the * *Days of the Month*, if they did, then † *Sunday* ought not to be reckoned, but *Monday* instead thereof; that if *Sunday* be the first Day of the Term, all Judgments will be on a *Sunday*. *Et per Holt Ch. Just.* If *Sunday* happen to be the *quarto die post*, it must of Necessity go to the *Monday* following; and so 'tis of *Essoins*, for they cannot be held on a *Sunday*, and as to the Relation of Judgments to the first Day of the Term, it can only be to the first Juridical Day, and all *Quindenæ* & *octabis* are inclusive. In this Court the Entry is, *die lunæ proxima post*, &c. which is inclusive; in the Common Pleas the Entry is, *A die*, &c. and yet that is inclusive of the Day; and he was of the same Opinion as in *Harvey and Broad's Case*.

(3)
Styles 382.

Submission to an Award by Bond dated 12 *Septemb.* so as it be made within six Days after the Date of the Bond, and it was made on that very Day on which the Bond was dated. *Et per Curiam*, 'Tis good, because that Day shall be inclusive, and be taken to be one of the six Days.

(4)
Sid. 186. 4 Mod. 96.
Computation of Time according to the Kalendar.
* P. 347

* Moved to quash an Indictment upon the Statute 13 H. 4. cap. 7. for a Riot, because Inquisition was not taken within a Month, (*viz. twenty-eight Days*) after the Offence committed, which is expressly required by the Statute: *Sed per Curiam*, the Time shall be computed, not according to *twenty-eight Days*, but according to *Kalendar Months*.

Tithes. See Burn's Eccl. Law. Tit. Tithes.

(1)
What are predial Tithes.

A L L Things titheable which grow from the Earth immediately, either as a natural Product thereof, or by the Industry of Men, as *Corn, Hay, Wood, Herbs, &c.* are called *predial Tithes*.

But

Tithes.

But those which do not arise immediately from the Earth, as Cattle, &c. What are mixt Tithes, and which are not the Product thereof, but are nourished by it, the Tithe thereof is called *mixt Tithes*. (2)

But *personal Tithes* are from and in respect of the *Labour of Men*. What are personal Tithes. (3)

All small *Wood*, under *Timber*, and likewise *Timber*, when cut down under twenty Years Growth, is called *Sylva cædua*, and titheable; but *Timber-Trees*, after twenty Years Growth, are not titheable, neither are the *Loppings* or the *Bark*, or the *Boughs* of such Trees titheable, because Part of the Trees themselves. Wood and Trees. (4)

Sylva cædua cut down to *fell* shall pay Tithes, but not to *burn* in the House, or to repair the same, or to inclose, or to enlarge the House for necessary Habitation. *Sylva cædua*, where it pays Tithes, where not. (5)

If a *Coppice* is cut, and the Tithes paid, and afterwards the *Roots* are grubbed up, they shall not pay Tithes, because they are Parcel of the Inheritance, and of the Land. 1 Roll. 637. Roots grubbed up shall not pay Tithes. (6)

Timber-Trees mortuæ, aridæ & putridæ, pay no Tithes, for being once discharged by being upwards of twenty Years Growth, they shall be always discharged. Cro. Eliz. 477. Trees more than twenty Years Growth pay no Tithe. (7)

* Tithes may be discharged three Ways, either by *real Composition, de modo Decimandi*, or by *Prescription*. (2.) By a general *Prescription, de non Decimando*. * P. 348 (3.) Or by *Grant*. Discharge of Tithes. (8)

A Discharge by *real Composition de modo Decimandi* is where Money or Land is enjoyed by the Parson, Time out of Mind, in Lieu of his Tithes; in this Case the Law always intends a Contract, or original Bargain, and this is a Charge which runs with the Land, and whereof any lay Owner shall take Advantage, for the *Modus* is become the Tithe, and the very Tithe in Specie is extinguished. Jones 368. Hob. 307. Discharge de modo Decimandi. (9)

(2.) A Discharge by *Prescription in non Decimando* is a Privilege only incident to Spiritual Persons; for as they are only capable of Tithes in Pernancy, so they only can discharge themselves by a general *Prescription in non Decimando*; this is therefore a *personal Privilege* which doth not run with the Land, so that if it be conveyed over, Tithes must be paid in Specie. Jones 368. Cro. Car. 422. Hob. 307. Hard. 315. Discharge by Prescription. (10)

(3.) A Discharge by *Grant*, and this is either to *particular Persons* or *Corporations* by the *Pope's Bull*, or to whole Orders of Men by Act of General Council, as to the *Templars, Hospitallers, Cisterians, &c.* and this Privilege is also personal, and cannot pass from one Person to another; so that if the Land be conveyed over, or reverting to the Founder, the Alienee and the Heirs of the Founder shall pay Tithes. Discharge by Grant. (11)

Now these *personal Privileges* are to be considered as they stand affected by the Statute 27 H. 8. by which Statute all Abbeys, &c. under the yearly Value of 200 l. *per Annum*, are given to the Crown; and because there is no Clause in that Statute to revive and save all personal Privileges belonging to the *Abbeys, &c.* therefore they are destroyed and extinguished. By the Statute 27 H. 8. (12)

By another Statute 31 H. 8. All *Abbeys, &c. above the Value of 200 l. per Annum*, are likewise given to the King, and in that Statute there is a Clause to revive and preserve all former Privileges. By the Statute 31 H. 8. (13)

Therefore these, whether discharged by *Prescription, Grant, or Composition*, in the Hands of former Owners, continue in the same Manner discharged of Tithes in the Hands of the King or his Patentees. 1 Cro. 423. Jones 368. Hob. 307. Hard. 101. (14)

Trade.

* P. 349

(15)
3 Lev. 365. 4 Mod. 183.
3 Cro. 467. Hutt. 73.
Moor 99. Owen 74.

* Wharton *versus* Lefle. Trin. 5 Will. 3.

IN a Parish consisting of 700 Acres of Arable, and 700 Acres of Pasture, Lands; there were *twenty-six Acres* sowed with Flax; adjudged by three Judges, *contra Holt Ch. Just.* That the Tithes thereof belong to the Vicar as a small Tithe, being so in its Nature; but the Chief Justice held, that the Nature of the Tithes depends upon the Nature of the Thing itself, and not upon the Nature of the Place where 'tis sown.

Trade.

Mayor of Winchester *versus* Wilks. Pasch. 4 Annæ. B. R. 2 Ld. Raym. 1129. S. C.

(1)
Mod. Cases 21. 1 Salk.
203. S. C. Whether such
a Corporation hath Gilda
mercatoria.

THE Corporation of Winchester declared upon a Custom, that it was not lawful for any Person to exercise a Trade there, except *homines liberi Gildæ mercatorie Civitatis illius, &c.* Et per Curiam, it was agreed, that such a Custom in London might be good, because their Customs are confirmed by many Acts of Parliament; but it was doubted, whether such Custom was good in any other City or Borough, for since the Defendant is at Liberty to live in that Place, 'tis unreasonable to restrain him from using a lawful Means for his Support and Livelihood: However, *per totam Curiam*, this Declaration is naught; for *non constat*, that the Corporation hath Gilda mercatoria, and it doth not appear whom the *Homines liberi de Gilda mercatoria* are; so they may be the whole Corporation, or some Part of them; and anciently the King's Grant to have *Gildam mercatoriam*, made them all a Corporation, (*viz.*) All the whole Vill.

* P. 350

(2)
† Cap. Par. 7. Information,
where it must be brought
in the proper County.

* Bridget Glass's Case. Mich. 8 Will. 3.

* 6 Rep. 19.
† 1 Cro. 23.

SHE was indicted before Commissioners of Oyer and Terminer at the Old Bailey, on the Statute 1 & 2 † Pb. & Ma. by which 'tis enacted, that no Person living in the Country shall sell any Haberdashers Wares by Retail, in any City or Town corporate, except it be in open Fairs, on Pain of Forfeiture for every Offence, 6 s. 8 d. and of the Wares sold, the one Moiety to the King, the other to him who shall seize and sue for the same in any of the King's Courts of Record, by Bill, Plaint, Debt, Information, or otherwise, &c. and that the Defendant did sell Haberdashers Wares, &c. *contra formam Statuti*: Mr. Northby moved to quash this Indictment, upon the Authority of * Gregory's Case and of † Farrington's Case, because those Words, (*viz.*) The King's Courts of Record extend only to the Courts at Westminster: Et per Curiam, 'tis true, Justices of Peace have not any Jurisdiction in this Case; but it hath been ruled since Gregory's Case, that Justices of Oyer and Terminer may determine this Matter by Way of Indictment, though not by Information: But since the Statute hath prescribed a particular Way to recover the Forfeiture, (*viz.*) by Action of Debt or Information, without mentioning an Indictment, therefore the Defendant is not indictable upon this Statute, for which Reason this Indictment was quashed.

(3) -
Indictment for using a
Trade not good.

Mary Reed's Case.

SHE was indicted for using the Trade of a Linen Draper at B. not having served seven Years Apprenticeship to that Trade, the Caption was *Ad generalem Sessionem Pacis tenet coram Majore and Burgesses of Bridgwater, infra Burgum de Bridgwater*; it was objected, that an Indictment for this Offence cannot be taken at a Sessions of a Town-Corporate, but only at the General Quarter-Sessions of the County, and this by Virtue of the Statute 31 Eliz. and even in that Case it will not be sufficient to say, *ad generalem Sessionem*, but *ad generalem quarterialem Sessionem pacis, &c.*

The

Traverse.

The King *versus* Hicks. Mich. 4 Will. 3. B. R.

INFORMATION was brought against the Defendant upon the Statute $\dagger$ 5 Eliz. for Using the Trade of, &c. not being Apprentice to it for seven Years; the Information was brought in $\dagger$ this Court, and the Using the Trade was in *Yorkshire*. *Et per Curiam*, this Information will not lie here, because by the Statute 21 Jac. it must be brought in the proper County, and all Informations against the Form of the Statute will be void. (4)
† Cap. 4.
* P. 351

The Queen *versus* Eliz. Franklyn.

SHE was indicted at a *Quarter-Sessions of a Borough*, for exercising a Trade, not having served seven Years *Apprenticeship*, and Mr. Eyre moved to quash it, because the Prosecution was commenced a Year after the Offence was committed. *Et per Curiam*, Upon View of the Statute of 5 Eliz. where a Moiety of the Forfeiture is given to the Informer, he must prosecute within the Year; but the Queen's Suit is not confined to the first Year, but she shall have another Year, where the Forfeiture is distributed by Moities, and in such Case, where the Party neglects the first Year, she shall have the whole. (5)
1 Salk. 370. S. C. Quashed on another Exception.

A *Pippin-Monger* is no Trade within the Statute 5 Eliz. but a *Brewer* is, *Quere* of an *Upholsterer*; but *Plowing and Digging* are not Trades within the Statute, for 'tis not Matter of Skill, but of Strength. (6)
1 Roll. Rep. 10. What Trade is within the Statute, what not.

Traverse.

Anonymous. Hill. 1 Annæ.

THE Defendant was sued by the Name of *John*, and he pleaded, that he was baptized by the Name of *Benjamin*, and traversed, that *ipse idem Jobannes* was ever known by the Name of *John*; and upon a general Demurrer to this Plea, *per Holt Ch. Just.* This *Traverse* is repugnant in itself, and very immaterial, for it had waived the precedent Matter of *Baptism*, which was well pleaded, and was now become the Substance of the * Plea itself; for now the Issue must be by what Name the Defendant was called or known, and not by what Name he was baptized, whereas he ought to have relied on his Name of *Baptism*, and concluded with it without a *Traverse*, for a Man can have but one Name, therefore it implies, a *Negative* in itself, without saying he was never known by the Name of *John*, &c. (1)
Where a *Traverse* is repugnant.
* P. 352

Bullen *versus* Benson. Mich. 10 Will. 3. B. R.

DEBT upon a Sheriff's Bond for an Appearance dated 20 Novemb. 9 Will. 3. conditioned, that the Defendant should appear in B. R. *die lune prox' post quinden' Sancti Martini*, &c. The Defendant pleaded the Statute, and that the Bond was *primo deliberat' by him* 30 Novemb. and that he was then taken and arrested by the Plaintiff by a Writ returnable in *Michaelmas Term*, &c. in B. R. and being so in Custody the Plaintiff took this Bond, *Et hoc paratus est verificare*. And upon a Demurrer to this Plea it was adjudged ill, for when the Defendant had pleaded, that the Bond was *primo deliberat' on the 30th Day of November*, he should not have rested there, but have traversed, that he delivered it on the 20th Day of November, according to *Yelverton* 138. for here the Date is material; for supposing the Arrest was before the Return of the Writ, and then after the Return the Plaintiff took a Bond antedated; this Bond is void because the Defendant was legally in Custody for Want of Bail, and ought to have been kept in Custody. (2)
Where a Plea is not good without a *Traverse*.

Traverse.

Beats *versus* Simpson. In C. B.

(3)
Virtute cujus is not traversable.

THE Case was, *ff.* Two *Habeas Corpora* were pleaded, and both of different *Teste and Returns*, the other Side replied, that he was brought up *Virtute* of the first Writ *Absq; hoc*, that he was brought up *Virtute* of the other Writ; and *per Treby* Ch. Just. a *Virtute cujus* is never traversable, because 'tis not a positive Allegation, but only a Deduction or Inference from another Matter. So is a *prætextu cujus*, and *vigore cujus*, and *per quod*, &c. for these Things. *Nec augent nec diminuant sed confirmant tantum.* *Powel* Justice agreed that *Virtute cujus* was in many Places no more than a bare Inference; but sometimes when it took in Matter of Fact, then it signified something by Way of Allegation, *whereupon*, &c. and then 'tis traversable, and it may so happen that nothing else is traversable.

* P. 353

* Suppose two Writs are taken out against *W. R.* of the same *Teste*, but of different Returns, and at the different Suits of *A.* and *B.* and afterwards *A.* procures a Warrant by which *W. R.* is arrested, and he gives a Bail-Bond, and in an Action of Debt brought on this Bond, the Condition whereof was for the Defendant to appear *die*, &c. he (the Defendant) pleads the Statute, and that he was then in the Custody of the Sheriff, by Virtue of a Writ returnable on another Day; the Plaintiff may reply, that he was in Custody, &c. by Virtue of a Writ returnable, as in the Condition of the Bond, *Et non virtute Brevis prædicti in placito defendantis mentionat*; *quod fuit concessum per Newill & Blencow* Justices: *Quære tamen*, for this is contrary to *Greenvills* Case, and against the Opinion of *Hale* Ch. Just.

Anonymous. Pasch. 9 Will. 3. B. R.

(4)
Where a Matter is confessed and avoided, it need not be traversed.

WHERE a Matter is *confessed and avoided* it need not be *traversed*. In *Replevin* the Defendant avowed for that *W. R.* was seised and made a Lease to him (the Defendant) for one Year, and so justified the Taking, &c. *Damage-feasant*. The Plaintiff replied, that true it is, that *W. R.* was seised, &c. but before he made a Lease to the Defendant he made another to the Plaintiff, which is still in Being, and not determined, this is sufficient without a Traverse, because the Title of the Defendant is confessed and avoided; but if the Plaintiff had traversed the Lease of the Defendant, it would have been good upon a general Demurrer, being only in the Nature of a double Plea; but upon a Special Demurrer it had been naught.

(5)
Cro. Car. 265, 266. Inducement to a Traverse ought to contain a sufficient Title.

That the Inducement to a Traverse ought always to contain sufficient Title, but 'tis not material, whether the Matter is true or false: Now the Reason why the Inducement should contain a Title, is because a Man ought not to deny the Title of another, without shewing colourable Title in himself; for if the Title traversed be found to be ill, and no Colour of Right or Title appears for him that traversed that Title, then no Judgment could be given.

Inducement to a Traverse cannot be traversed.

But the Inducement to a Traverse can never be traversed, because that would be a *Traverse after a Traverse*, which would be not only infinite but absurd, because it would be to quit his own Title, and fall upon the Title of another.

* P. 354

* *Groenvelt versus Burwell & al.* Trin. 12 Will. 3. B. R. 1 *Ld.* Raym. 213. 454. S. C. Comyns 76. S. C.

(6)
* 1 Salk. 144, 200, 263. S. C. Where the Legality of a Warrant was put in Issue, 'tis ill.

THERE are some short Notes of a Case between these Parties, but upon other Points, in * 1 *Salk.* but the Case was thus: *ff.* In *Trespass* and *F* an Imprisonment for an Assault, Beating, Wounding and Imprisoning him; the Defendant as to the Beating and Wounding, pleaded Not guilty, *Et quoad Residuum transgressionis*, &c. he set forth a Power in the *College of Physicians in London* to examine and commit for ill Practice in Physick, and that they adjudged the Plaintiff guilty *de mala praxi*, &c. and so they made a Warrant to the Defendant to arrest him and to carry him to *Newgate*, by Virtue of which Warrant they

Traverse.

they did arrest the Plaintiff, &c. *Quæ est eadem resid', &c.* The Plaintiff *protestando* against the Power, for Plea said, that the Defendant arrested him *de injuria sua propria, & non Virtute Warranti pred'*; and upon Demurrer to this Replication it was adjudged ill, for the Traverse doth not deny that there was such a *Warrant*, but the Legality of it, and that the Plaintiff was not taken by Virtue thereof, which implies, that he might be taken for some other Cause, and if that was his Case, then he should have pleaded it Specially, and shew for what Cause he was taken: Now by this Replication it may be intended, that the Warrant was after the Arrest, and that there was no such Warrant, therefore he should have traversed *Absque hoc*, that there was a Warrant, or *Absque hoc*, that it issued before the Arrest, and then a Matter of Fact (from whence a Question in Law might arise) would have been put in Issue, and not the Legality of the Warrant, which is Matter of Law.

Radborne *versus* Kennadale. Mich. 4 Jac. 2. Rot. 640.

IN *Replevin*, the Defendant made Conufance as Bailiff to Sir *A. B.* setting forth, that he was *seised in Fee* of the *Place where, &c.* and so justifies the Taking the Cattle *Damage-feasant*: The Plaintiff in his Replication confesses the Seisin of Sir *A. B.* the Son, but pleads, that his Father was *seised, &c. in Fee*, and made a Lease to *W. R.* for three Lives of the *Place where, &c.* that *W. R.* was dead, and that *W. W.* entered as Occupant, and made a Lease to the Plaintiff; and upon a Demurrer to this Replication in Bar, for that the Plaintiff had not traversed *the Seisin in Fee of the Son*, it was held *per Curiam*, * relying upon the Case in † *Bulstrode*, that either in *Trespas* or in *Avowry*, if a Freehold is pleaded, it must be traversed, unless the Party doth wholly & confess and avoid it by a defeasible Title, only with this Difference; that if in an Action of *Trespas* a Freehold is pleaded, the Party may traverse it generally, without inducing his Traverse by a Title, but in * *Avowry*, the Traverse must be induced by setting forth a Title: *Et per Curiam*, the Want of a *Traverse* is Matter of Substance in the principal Case, because there are *two Affirmatives* in the Pleading, and that will not admit any Trial without a *Traverse*, therefore 'tis not helped by a general Demurrer, but a superfluous *Traverse* is only Matter of Form, because it doth the other Party no Injury.

(7)
3 Mod. 311. In *Trespas* and in an *Avowry*, if a Freehold is pleaded, it must be traversed.

* P. 355
† 1 Bull. 48.
§ Dyer 171. 3 Cro. 650.
Sid. 227.

* Owen 51,
1 Leon. 44. denied.
1 Roll. Rep. 264.

Newdigate *versus* Selwin. Pasch. 2 Will. 3. B. R.

IN *Covenant* for not keeping and employing his *Apprentice*; the Defendant pleaded, that from such a Time to such a Time he did keep and employ the said *Apprentice*, and that then he *servitium ipsius* (the Defendant) *deseruit & reliquit & ab eo decessit & ulterius in servitio suo remanere neglexit & abinde postea bucusq; ad loca incognita sese elongavit & absentavit*; the Plaintiff replied and traversed, *absque hoc quod servitium* (the Defendant) *deseruit vel reliquit vel ab eo decessit, vel in servitio suo remanere* (omitting *neglexit*) *vel sese elongavit*; and upon a Demurrer to this Replication it was objected, that the Traverse was multifarious, consisting in so many Particulars in the Disjunctive, and that by omitting the Word *Neglexit*, it was not Sense: *Sed per Curiam*, the Traverse is good, for 'tis pursuant to the Defendant's Plea, which may be traversed, as he hath pleaded it; and that Part of it, which is Nonsense, will not hurt, because the Traverse is good without it.

(8)
Where a *Traverse* is good, because pursuant to the Plea.

Helliot *versus* Selby. Trin. 2 Annæ. 2 Ld. Raym. 902. S. C.

THIS Case is reported in † 2 Salk. but upon another Point: *ff.* In *Replevin*, the Defendant avowed *Damage-feasant*; the Plaintiff replied, that *W. R.* was *rite & legitime, seised* of the Manor of *H.* and being so *seised*, did grant a Copyhold Messuage to him 12 *Julii*, in such a Year, and that he had Common in the Place where, &c. for himself and Tenants, &c. The Defendant rejoins and traverses, that *W. R.* was *rite & legitime* seised in Fee, and granted the Copyhold Messuage to the Plaintiff on the 12th of July, &c. and upon a Demurrer to this *Rejoinder* it was adjudged ill; for *per Curiam* the *Rite & legitime* * is not traversable, nor the Day of the Grant; for if the Lord of the Manor was a Disfeisor,

(9)
† 2 Salk. 701. What is not traversable.

* P. 356

Traverse.

Dyer 365. contra.

feisor, 'tis as to this Purpose the same Thing as if he was lawfully seised; and the Day of granting it is not material, for a Grant at one Day is a Grant at any Day.

Longford *versus* Webber. Hill. 2 & 3 Jac. 2. Rot. 965.

(10)

Where a Justification upon a Possession is not good.

IN *Trespas*, the Defendant pleaded, that he was lawfully possessed of such a Close, and so justified the Taking the Cattle *Damage-feasant* in his Close; and upon a Demurrer to this Plea the Plaintiff had Judgment; for though it was insisted, that there was the same Reason for justifying upon a *Possession* that there was for maintaining an Action upon a *bare Possession*; yet the Court held, that there never was such a *Traverse* as *Absq; hoc quod possessionatus fuit*, for a Possession cannot be but by Contract, but a *Seisin* may be by *Right or Wrong*, and he who hath *Seisin*, hath by Law a good Title against all Men but the Disseisee, for he may maintain an Affize.

Horn *versus* Lewin. Hill. 12 Will. 3. B. R. 1 Ld. Raym. 639. S. C.

(11)

2 Salk. 583. Where a Traverse is ill, where not.

* 1 Roll. Rep. 46. Rast. Ent. 557, 558, 630.

IN *Replevin*, the Defendant avowed for a Rent-charge in arrear; the Plaintiff replied, *de injuria sua propria absq; hoc*, that the Rent was in arrear; and upon a Special Demurrer, for that this Replication and Traverse amounted to no more than the General Issue; and *per Curiam*, this is not a proper Inducement to the Traverse, as if in *Trespas* a Man should plead *de injuria sua propria absq; hoc quod est culpabilis*, so *de injuria sua propria* * *absq; hoc quod* he is Bailiff, and *de injuria sua propria absq; hoc*, that there was such a Prescription, these are naught, the natural and proper Plea to this *Avowry* had been *nihil in aretro*, which is *quasi* the General Issue, so that this is a pleading Special Matter, which amounts to the General Issue; and no other Evidence can be given but such as might have been given upon the proper Issue; therefore this Circumlocution is ill, because it prolongs the Cause by enforcing the Avowant to an unnecessary Replication; and though 'tis no more than Matter of Form, because it doth not alter the Evidence; yet *per Holt* Ch. Just. this *being upon a Special Demurrer*, is naught.

* Anonymous. Pasch. 9 Will. 3.

* P. 357

(12)

There must be an Inducement to a Traverse.

PER *Holt* Ch. Just. A Man ought to induce his Traverse, and the Reason is, because he ought not to deny the Title of another, till he shew some colourable Title in himself, for if the Title traversed be found naught, and no Colour or Right appears for him who traversed, it would happen, that no Judgment could be given; but an Inducement cannot be traversed, because that would be a Traverse after a Traverse, which would be not only infinite but absurd; for 'tis quitting his own Pretence of Title, and falling upon the Title of another.

(13)

1 Vent. 184. Where the Time must be traversed before and after the *Trespas*.

IN *Trespas* for taking and carrying away his Goods 1 *die Januarii*, the Defendant justifies the Taking 2 *die Januarii*, *quæ est eadem transgressio*; adjudged naught upon a Demurrer, because he doth not Traverse the Time before and after; and to say *quæ est eadem*, &c. is not sufficient, because that is not traversable.

(14)

Where the Traverse doth not answer the Time.

IN *Trespas* laid to be done 1 *August*, the Defendant justifies for Right of Common after the Corn is cut, and that after it was cut he put in his Cattle, *absq; hoc quod est culpabilis aliter vel alio modo*; and upon a Demurrer to this Plea it was adjudged ill, because it did not answer the *Trespas* done, 1 *Aug.* having no Reference to that Time.

(15)

3 Lev. 69.

IN *false Imprisonment*, &c. the Defendant justified under a *Latitat*, and a Warrant thereon, *virtute cujus* he arrested the Plaintiff at *H. Ec.* *Absque hoc quod est culpabilis aliter vel alio modo*; the Plaintiff replied, *de injuria sua propria absq; tali causa*; 'tis true, upon a Demurrer, this Replication was held ill, because there

Treason. Trespass.

was Matter of Record, (*viz*) a *Latitat* and Matter of Fact, (*viz.*) An *Arrest* set forth in the Plea, which the Plaintiff ought to have answered in a particular Manner, and not generally, by saying *absq; tali causa*.

In Trespass for Breaking and Entering his Close, the Defendant justified by a Prescription to dig for Coals; the Plaintiff replied, *de injuria sua propria absq; tali causa*, but did not Traverse the Prescription in a particular Manner; and upon a Demurrer to this Replication it was objected, that the Plaintiff ought to have traversed thus (*viz*) *Absq; hoc*, that the Defendant, and all those whole Estate he had in the Premises, have, time out of Mind, used to enter into the Close, &c. and to dig there for Coals.

(16)

² Lutw. Kilburn v. Valence.

* Treason.

* P. 358

The King *versus* Speke. Mich. 1 Will. 3. B. R.

WRIT of Error to reverse an Attainder of High Treason, the Error assigned was, that upon Oyer of the Indictment, the Defendant *Speke* confessed it, and thereupon Judgment was given, but without demanding of him, *what he had to say for himself, why Judgment should not be given*: And *per Curiam*, this is erroneous, for 'tis a necessary Question, because he may have a Pardon to plead, or may move in Arrest of Judgment, for which Reason the Attainder was reversed.

(1)

Judgment in High Treason reversed, because the Court did not demand of the Defendant what he had to say.

At Common Law, before the Statute 25 Ed. 3. Treason was a very incertain Crime; for Killing the King's Messenger was Treason; so likewise where a Man grew popular, this was construed to be Inroaching Royal Power, and held to be Treason, so that by the Excess of these Times, any Crime, by aggravating the Circumstances thereof, was heightened into Treason.

(2)

Before the Stat. 25 Ed. 3. Treason was an incertain Crime.

Therefore this Statute was made to determine what should be Treason; and since it was made, there can be no constructive Treason, (*i. e.*) nothing can be construed to be Treason, which is not literally specified in that Statute; therefore counterfeiting the Coin is Treason within the Letter of this Act, but *Washing* it is not, nor *Filing* or *Clipping*, tho' within the same Mischief and Effect, for this Statute must not be construed by Equity, because 'tis a declarative Law, and one Declaration ought not to be a Declaration of another; besides, it was made to secure the Subject in his Life, Liberty and Estate, which, by admitting Constructions to be made of it, might destroy all.

(3)

The Defendant was indicted for High Treason in raising a Rebellion in Carolina in America, and tried at Bar in Westminster Hall and acquitted; and it was held, that this Trial was good by Virtue of the Statute 25 H. 8. cap. 2. by which 'tis enacted, that *Foreign Treasons*, may be tried by a Special Commission, * or by the Court of King's Bench by a Jury of Middlesex, that being the County in which that Court sits.

(4)

¹ Vent. 349. Treason done beyond Sea may be tried in Middlesex.

* P. 359

Trespass.

Lambert *versus* Thurston. Pasch. 2 Will. 3. B. R.

TRESPASS for breaking his Close *vi & armis & damnum 20 s.* and upon a Demurrer to this Declaration, it was objected, that the Damages being laid to be under 40 s. the Suit ought to have been in the County-Court; *Sed per Curiam*, The Trespass is alledged to be done *vi & armis*, and for that Reason the County-Court cannot hold Plea of it, for they cannot Fine, being no Court of Record, and 'tis at the Plaintiff's Election to declare *vi & armis*, or not.

(1)

³ Mod. 275. Trespass *vi & armis* cannot be tried in the County-Court. ⁴³ Ed. 3. 21. b. ² Inst. ³¹¹ F. N. B. 47. ¹ Mod. 215.

Trespafs.

Brook *versus* Bishop. Hill. 1 Annæ. B. R. 2 Ld. Raym. 823. S. C.

(2)
2 Salk. 639. Trespafs
with a Continuando, not
good.

TRESPASS, *Quare vi & armis* 2 die Aprilis, the Defendant *clausum* (of the Plaintiff) *fregit & intravit & herbam suam pedibus ambulando conculcavit & consumpsit*, and also for cutting down his Under-Wood and Trees, *transgressiones prædictæ a prædicto secundo die Aprilis usque 28 ejusdem mensis diversis diebus & vicibus continuando*. Upon Not guilty pleaded, the Plaintiff had a Verdict and entire Damages; it was moved in Arrest of Judgment, that the *Cutting the Trees did not lie in Continuance*. *Et per Holt Ch. Just.* That is very true, but then the *Continuando* is void as to that Trespafs, and Damages shall be intended to be given by the Jury for those Trespaffes of which there might be a *Continuance*; but then it was objected, that the Plaintiff at the Trial gave Evidence of the Defendant's cutting *Trees and Under-Wood* at several Times, which *per Curiam*, could not be upon this Declaration, at least it ought not * to have been, and therefore shall not be intended: But the Way to declare for such Trespaffes which lie in *Continuance*, and if the Plaintiff would give Evidence of several Trespaffes, is for him to set forth in his Declaration, that the Defendant, *between such a Day and such a Day cut several Trees*, and not to lay a *Continuando transgressiones from such a Day to such a Day*; and upon such a Declaration he may give in Evidence a Cutting on any Day within those Days; so is the *Year Book* * 21 H. 6. In Trespafs, for that the Defendant, between such a Day and such a Day, *per diversas Vices* took and carried away so much Corn, *Quod nota* for the Right Way of declaring: *Et per Powell Justice*, the Practice was to give in Evidence several Trespaffes upon the Way of declaring, as in this Case, but that it was Wrong; and if the Plaintiff had done so at the Trial, as it was alledged, he ought not to have Judgment.

* P. 360

* 21 H. 6. 43. 2 Lev. 210.

Gipps *versus* Wollescot. Trin. 7 Will. 3. B. R. Rot. 301.

(3)
Trespafs for fishing and
taking Salmones, and did
not say suos, not good.

TRESPASS against the Defendant, for that he in *separali piscaria & in libera piscaria sua apud H. piscavit*, and did take and carry away 500 *Salmons*. *Per Holt Ch. Just.* a Man may have a free Fishery in his own Soil; as for Instance, suppose he hath a River within his Manor, and another hath a Right of fishing with him; but because it was not said *Salmones suos*, nor *ibidem cepit*, the Defendant had Judgment. The same Point was adjudged *Pasch. 5 Will. 3. between Smith and Kemp*.

(4)
Sid. 239.

Per Curiam, In Trespafs the Defendant may plead a *Title*; but if an Action of Trespafs be brought for the *Mesne Profits*, after a Recovery in Ejectment the Defendant can neither plead a *Title* or give it in Evidence.

(5)
1 Vent. 329. Trespafs
with a Continuando, not
good.

In Trespafs for Fishing in his several Fishery, and for taking *twenty Bushels of Oysters, continuando piscationem prædictæ*, from such a Day to the Time of the Action brought: Upon Not guilty pleaded, the Plaintiff had a Verdict, but could never get Judgment upon the Authority of * *Playter's Case*, because the Fishing mentioned under the *Continuando* was uncertain, not expressing the Quantity or Quality of the Fish; 'tis true *Hale Chief Justice*, said, that they were more strict formerly in the Certainty of Pleading than now, for now an *Indebitatus Assumpsit* for Goods sold is held well, without any farther Certainty.

(4)
2 Saund. 401. Where
the Defendant pleads a
Possession, but did not set
forth a Title, not good.
* P. 361

In Trespafs for breaking his Close and Eating his Grass with Cattle; the Defendant pleaded, that at the Time of the Trespafs, &c. he was *possessed of all the Corn growing on four Acres of Land Parcel of the locus in quo*, as of his proper Goods, by Reason whereof at the Time in which the Trespafs was supposed to be done, he entered with his Cattle to mow, take and carry away the Corn, and in entering, the said Cattle did the Trespafs, *sparsim & raptim*, and so justifies the Trespafs precisely; and upon Demurrer this Plea was adjudged ill, because the Defendant did not set forth any *Title* which he had to the Corn, but only that he was *possessed* thereof, which is not sufficient without a *Title*, because the Property shall be intended to be in the Owner of the Soil.

Trial and new Trial.

King *versus* Alberton. Mich. 10 Will. 3. B. R.

A Motion was made for a New Trial, because the Defendant having pleaded a Composition with his Creditors, had forgot to carry down Witnesses at the Trial to prove the Subscribers Hands. *Sed per Curiam*, it was denied, because the Plaintiff sued for an honest Debt, and *Holt Ch. Just.* remembered the Case of an Action of Debt brought against an *Heir*, who pleaded *Reins per descent*, upon which they were at Issue, and there was a Verdict against the *Heir*, because he had not brought the Settlement with him, by which he was seised of an *Esstate-tail*, and for this Reason he moved for a New Trial; but it was denied, because the Plaintiff had recovered an honest Debt.

(1)
Where a New Trial shall not be granted.

* Anonymous.

* P. 362

IN *Covenant*, after a Verdict for the Plaintiff, the Defendant moved for a New Trial, suggesting that he was an *Alien*, and that the Sheriff had returned twelve of the *Jury*, but that there was not an *Alien* amongst them: *Et per Curiam*, the Defendant shall never have a Trial *per medietatem linguæ*, without Prayer, and if 'tis granted, and the Sheriff returns none but *Denizens*, the Defendant ought to challenge them before the Trial; and if the Challenge is not allowed, then to insist on a Bill of Exceptions; but the Suggestion now made by this Defendant is against the Record; and if 'tis true, he may have an Action against the Sheriff for a false Return.

(2)
Where the Trial shall be per medietatem linguæ, where not.

Note, If an *Alien* is sued as Executor he shall not have a Trial *per medietatem linguæ*, because in such Case he is sued *in auter Droit*.

Sir Ch. Berrington's Case & al'. Mich. 5 Annæ B. R.

IN *Trespas* and False Imprisonment against several Defendants, the Plaintiff had a Verdict; and afterwards it was moved for a New Trial, because as to one of the Defendants the Verdict was against Evidence. *Sed per Curiam*, This cannot be done, for the Court cannot set aside the Verdict as to some, and not as to others, and to grant a new Trial as to all would be a Prejudice to those who are duly acquitted.

(3)
Trespas against several Defendants, the Plaintiff had a Verdict, but as to one of them it was against Evidence, no New Trial was granted.

Anonymous.

THE *Attorney General* moved for a New Trial at Bar for the King, upon an *Indictment for Perjury*, but it was denied, because the King is not interested in the Indictment, otherwise than in Point of *Common Justice*.

(4)

Anonymous. Pasch. 1702. B. R.

RULED, that if the Plaintiff would not enter his Issue, or if 'tis entered, and he will not carry down the Cause to Trial, the Defendant may by Rule compel him to enter it, and * if 'tis entered, the Defendant may carry it down by *Proviso*; and that this is the standing Rule of the Court; and in this Case *Serjeant Darnel* moved, that the Plaintiff's Evidence depending on certain Town-Books in the Custody of the Defendant, and that he having refused to give Copies thereof, &c. that the Plaintiff might not be compelled to proceed till the Defendant gave him Copies, but it was denied; for *per Holt Ch. Just.* The Defendant is not bound to help the Plaintiff to Evidence against himself.

(5)
Of carrying down a Cause by Proviso.

* P. 363

The Defendant not bound to help the Plaintiff to Evidence.

Regula.

Trial and new Trial.

Regula. Hill. 16 Car. 2. B. R.

Rule. (6)

OR DINATUM est, quod nisi causæ triandæ apud London & Middlesex intratæ fuerint cum capitali Justitiario hujus Curie per spatium duarum dierum ante Sessionem qua triandæ sunt, marescallus potest intrare Ne recipiatur ad instantiam defendentis vel ejus Attornati, &c.

Hall versus Hill. Mich. 1 Annæ.

(7)
Judges of an inferior Court granted a New Trial after a second Scire facias was brought against the Bail.

IN an Action brought in an inferior Court, (viz.) in the Court at Bristol, the Plaintiff had a Verdict and Costs taxed; and after a second *Scire facias* against the Bail, the Judge of that Court granted a new Trial, and thereupon the Court of B. R. being moved, made a Rule for the Judge of the inferior Court, to shew Cause why an Attachment should not be granted against him: For *per Curiam*, though a new Trial ought to be allowed, if freshly pursued, yet 'tis a Misdemeanor in a Judge to grant a new Trial after the Party hath rested so long under a former Trial, and it may be a Question whether any Court can grant a new Trial to be had before themselves: There cannot be a new Trial at Bar as there may at *Nisi prius*, for in the last Case 'tis but reasonable, that the Court should judge how the Judge of *Nisi prius* has executed his Authority.

(8)
Sid. 157. Of a Mis-trial in an improper County,

Covenant was brought by the Plaintiff in *Hampshire*, for not repairing a House in *Berkshire*, and Issue being joined upon *Non infregit conventionem*, the Cause was tried in *Hampshire*, and the Plaintiff had a Verdict, but could never get Judgment; for *per Curiam*, this is a Mis-trial, because this being a Special Issue, nothing can be given in Evidence but the not Repairing in *Berkshire*; especially since the Suit is between the very Parties to the Deed, and not between Assignees.

(9)
Sid. 325. 1 Lev. 208.
Trial good, if by the County where the Matter in Issue doth arise. Postea 11. S. P.
* P. 364

Debt upon Bond, the Action was laid in *London*, and the Condition was, for Performance of Covenants in an Indenture, by which a *Walk*, called *Shrubwalk*, in the County of *Northampton*, was granted, &c. and the *Venue* was of *Shrubwalk*, and the Cause was tried in *Northampton*; and after a Verdict for the Plaintiff it was insisted, that here was a *Mis-trial*, because the *Venire facias* could not come from a *Walk in a Forest*, which is only an Office or Liberty: *Sed per Curiam*, this being tried by a *Jury* where the Matter in Issue did arise, 'tis within the Statute 16 & 17 Car. 2. cap. 8. 'tis true, the Words of that Statute are, (viz.) *It shall be good, if tried by the County where the Action is laid*, but that must be understood by the County where the Matter in Issue doth arise; for otherwise it would destroy the whole Law concerning Juries, to try it in a County foreign to the Issue, as it may, if tried in the County where the Action is laid.

(10)
Sid. 60, 118. Where the Plaintiff may lay his Action in what County he will.

The Plaintiff was *Apprentice* to the Defendant, who covenanted to instruct him in such a Trade, and for not performing it an Action of Covenant was brought and laid in *Middlesex*; the Defendant pleaded a Departure out of his Service in *London*; and upon a Demurrer to this Plea it was insisted for the Defendant, that the *Venue* ought to be from *London*, where the Departure was, and the rather, because the Cause of Action in *Middlesex* was admitted by the Demurrer: *Sed per Curiam*, in personal Actions, and in such which are transitory, the Plaintiff may lay his Action in what County he will, and the Jury ought to find all local Acts, though in another County.

(11)
Antea 9. S. P.

Covenant, and the Action was laid in *London*, and Issue was joined upon a Feoffment in *Oxfordshire*, of Lands in that County, and the Cause was tried in *London*; after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that this was a *Mis-trial*, because a Feoffment of Lands in *Oxfordshire* is local, and therefore the Cause ought to have been there: *Sed per Curiam*, this is helped by the Statute 17 Car. 2. being tried in the County where the Action was brought.

(12)
5 Mod. 405. Where a wrong Venue is aided by the Statute.

Covenant for not repairing a House in *Chester*, the Defendant pleaded *reparavit*, upon which they were at Issue, and the *Venire facias* was from the County of *Chester*

Trover.

Chester at large; after a Verdict for the Plaintiff it was objected, this was a *Mistrial*, for the Issue being local, (*viz.*) at *Chester* generally, and the Trial being in the County of *Chester* at large, it was by a Jury of a wrong County: And *per Curiam*, this is not aided by any Statute, but only a wrong *Venue* in a proper County, as if the Issue is at *Islington* in *Middlesex*, and the *Venue* is of *Hampstead* in the same County, that is Right, but the *Venue* is Wrong, and that is aided.

* Trover.

* P. 365

IN *Trover*, the Plaintiff declared for *ten Pair of Curtains and Vallance*, good without shewing the Kind and *Quantum* of Stuff, and so it is of any such artificial Things. (1)
2 Saund. 74.

It lies *de Denariis*, though out of a *Bag*, for the Action is not to recover the Money, but the Damages. (2)
1 Cro. 89.

It lies for a *Spaniel*, but not for a Hawk unless reclaimed, and the Reason is for Want of *Property*, and therefore the Plaintiff always proves a Property in himself and a Conversion by the Defendant. (3)
1 Mod. 243.

Trover for a Horse, the Defendants justify the Taking as a *Distress* for Toll; naught upon a Demurrer, because the Conversion is not answered, for a *Distress* is no Conversion. (4)
Hutt. 10. Hob. 187.
S. C. 10 Rep. 46.

Trover, &c. for 100 *Sheep*, the Defendant justified under a *Fieri facias*, by Virtue whereof he took them in Execution: *Et per Curiam*, upon Demurrer this was adjudged ill, because this Plea doth not answer the *Conversion*, he should have pleaded Not guilty, and given this Matter in Evidence at the Trial. (5)

Trover against Husband and Wife, the Plaintiff cannot declare of a Conversion by the Husband and Wife, to the Use of the Wife, or to the Use of the Husband and Wife. (6)

But he may declare of a Conversion by the Husband and Wife, to the Use of the Husband, or that the Wife converted the Goods to the Use of a Stranger, but not to her own Use, or that she converted them to the Use of her and her Husband. (7)

Where the Defendant comes to the Possession by finding, in such Case Denial is a Conversion; but if he had the Goods by Delivery, there Denial is no Conversion, but Evidence of a Conversion; now in both those Cases the Defendant had a lawful Possession, (*viz.*) either by Finding or by Delivery, and where the Possession is lawful, the Plaintiff must shew a Demand and a Refusal, to make a Conversion. (8)

But if the Possession was tortious, as if the Defendant takes away the Plaintiff's Hat, there the very Taking is a sufficient Proof of the Conversion.

* Fuller *versus* Smith. Mich. 8 Will 3. B. R.

* P. 366

IN *Trover*, the Plaintiff declared of a Finding by ten Persons, and that nine of them converted the Good; upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment in C. B. but upon a Writ of Error in B. R. the Judgment was reversed, because the Conversion is the Gift of the Action, for if a Man finds Goods, 'tis lawful for him to take them up. (9)
Conversion is the Gift of the Action.

Trust.

Benbrigg *versus* Day. Hill. 3. Will. 3. B. R.

(10)
Where the Plaintiff may
take several Damages,
and release them as to one
Thing which is incertain.

TR O V E R for several Things, and amongst the rest *pro duobus falcris*, and upon a Demurrer to the Declaration, for that *falcris* was an insensible Word: Holt Ch. Just. would not abate the Declaration: because he said that the Plaintiff might take several Damages as to the other Things, and might release them as to this Word, and so take Judgment for the rest.

Hartford *versus* Jones. Mich. 10 Will. 3. B. R. 1 Ld. Raym. 393. S. C.

(11)
2 Salk. 654. S. C. Upon
another Point. What
Plea is good in Trover,
what not.

IN Trover and Conversion, the Defendant may plead *Not guilty*, and give in Evidence, that he distrained the Goods, and detained them till he was paid, but he cannot plead specially, that he *took the Goods by Distress*, or that he *detained* them as Holt till paid for the Horses standing, & *sic de similibus*, for the Conversion is lawful, and none is confessed; but if he pleads a Matter which confesses a Conversion, and avoids it, as the Case is in * *Yelverton*; 'tis good *per Holt Ch. Just.* and so it was adjudged in this Case.

* Yelv. 198.

(12)
1 Vent. 211.

Trover *de duobus Centenis plumbis Urae, Anglice*, Two hundred Tun of Lead Ore, it was objected, that *Centena* was properly a Hundred in a County: *Sed per Curiam*, 'tis good, as here with an *Anglice*, so 'tis *de duobus ponderibus Casei, Anglice*, two Weights of Cheese; so 'tis *de duobus oneribus Cupri, Anglice*, two Horse-Loads of Copper, for these Words are to be understood according to the Subject Matter.

(13)
2 Saund. 74.
Sid. 98. 2 Vent. 78.

In Trover, the Plaintiff declared for *ten Pair of Curtains and Vallance*, good, without shewing the Kind and *Quantum* of the Stuff, and so 'tis of such artificial Things; but Trover for *Planks*, unless the Plaintiff sets forth how many is not good: but for Planks in his Granary, or for Books in his Study, is good.

(14)
Hardr. 111.
* P. 367

* In Trover for *Letters Patents* of Wine-Licence, after a Verdict for the Plaintiff, it was objected, that Letters Patents are a Record, and there cannot be a Conversion of a Record. *Sed per Curiam*, the Letters Patents in the Declaration are only an *Exemplification* of those under the Great Seal, for which Trover lies, and they may be converted.

Trust.

(1)
Ch. Rep. 25. 2 Ch. Rep.
231. Where the Son is
joined with the Father in
a Purchase it shall be in-
tended for his Advance-
ment.

TH E Father sold the ancient Estate of the Family, and with the Money purchased a new Estate in his and his Son's Name; the Father devised the Lands to his Grandson, and died, the Devisee pretending, that the eldest Son, who joined in the Purchase with his Father, was only a Trustee. *Sed per Curiam*, Where the Purchase is to the Father and Son, he shall never be taken to be a mere Trustee, unless so expressly declared, but it shall be intended as an Advancement of the Son, especially if he is not otherwise advanced, or left unprovided; and it was the ancient Way to join the Son in all Purchases to prevent Wardship.

(2)
Ibidem. Where Money
is to be paid out of the
Profits, &c. the Lands
cannot be sold.

Where a Trustee is to pay Debts, Legacies, or Portions out of the *annual Rents, Issues, and Profits of the Estate*, he cannot alien or sell to raise the Money, unless 'tis to be paid at a certain and prefixed Time; and if the annual Profits will not do it within that Time, then he may sell, for 'tis within the Intention of the Trust.

Variance.

The Testatrix made *W. R.* her Executor, and gave all her Estates real and personal for the Payment of her Debts and Legacies, and amongst other Legacies she gave 200 *l.* to her Uncle, who was her Heir at Law; *per Curiam*, this is a Devise of the Lands to *W. R.* in Fee, and no implied Trust in him for the Benefit of the Heir, as to the Surplus, after Debts and Legacies paid; for if that had been intended by the Testatrix, then the Devise of 200 *l.* to him had been to no Purpose.

(3)

Devise of all her real and personal Estate is a Devise in Fee. Ibidem. 197.

* The Wife having assigned her Term before Marriage, the Husband mortgaged the Trust. *Et per Curiam*, where a Term is settled in Trust for a Jointure, or in Pursuance of Marriage Articles, or if it be the Term of the Wife, and assigned by her before Marriage, the Husband can neither charge, dispose or forfeit it by Outlawry, and this hath been the constant Course in Chancery since *Queen Elizabeth's* Reign; but if the Assignment is made after Marriage in Trust for the Wife, 'tis then voluntary and fraudulent.

(4)

1 Ch. Rep. 225. See 266. Where the Wife assigns her Term before Marriage, the Husband can never charge it. * P. 368

A Trust of a Fee or Tail is forfeited by Treason, but not by Felony; for such Forfeiture is by Way of Escheat, and an Escheat cannot be but where there is a Defect of a Tenant, but here is a Tenant.

(5)

Hard. 495. Trust of a Fee-simple or Tail, is forfeited by Treason.

Variance.

IN Ejectment for a Messuage, with the Appurtenances: Upon Not guilty pleaded, the Plaintiff had a Verdict, *Quoad parcellam Messuagii jacen' next the Messuage of F. Neev*, and the Judgment was, that the Plaintiff recover the Term of and in Parcel of a Messuage lying next the Messuage in the Occupation of *F. Neev*, so that the Verdict was for a Messuage next the Messuage of *F. Neev*, and the Judgment was for a Messuage next another Messuage, in the Occupation of *F. Neev*; now admitting this is a Variance 'tis amendable by the Statute 16 & 17 Car. 2. cap. 8. (viz.) The Words are, *All such Omissions, Variances, Defects, and other Matters of like Nature, not being against the Right of the Matter of the Suit, shall be amended*: But a Messuage of *F. Neev*, and a Messuage in the Occupation of *F. Neev*, seems to be no material Variance.

(1)

Raym. 398. Variance, where 'tis amendable by the Statute 16 & 17 Car. 2.

In Replevin for taking *averia*, and the Writ and Declaration were both for taking *Averia*, (viz.) a Mare; and upon a Demurrer it was objected, that a Mare could not be *averia*; and for this Variance between the Writ and the Declaration, the Defendant had Judgment. 2 *Lutw. Ginns Case*.

(2)

Postea, 9. S. P. Variance between the Writ and Declaration.

* P. 369

(3)

* Error to reverse a Judgment in C. B. in Ejectment, the Writ was abated, for that it was to remove the Proceedings between *W. R.* and *W. W.*, of the City of *Excester*, in the County of the City, and a Blank was left for the Addition, and the Record certified was, that *W. R.* of *North Moulton in the County of Devon*, Yeoman, was attached to Answer *W. W.* Clerk; and for this Variance between *W. R.* in the Writ, and *W. R. with the Addition* in the Record certified, it was abated.

Sid. 103. Between the Writ of Error and Record certified.

(4)

Error to reverse a Judgment in C. B. in Trespass, the Writ was *W. R. de, &c. in Com. Warwick*, and the Record certified was *W. R. de, &c. in Com. Lincoln*. *Per Curiam*, 'tis a material Variance, and by Reason whereof the Record was not removed.

Sid. 193. Between the Writ of Error and Record certified.

(5)

Writ of Error in the Exchequer-Chamber to remove a Record out of *B. R.* of a certain Trespass the Husband and Wife had done, and the Record certified was of a Trespass done by the Woman alone, and for this Variance the Writ was abated.

Sid. 269. Between the Writ of Error and the Record certified.

Venire Facias.

Burt *versus* Atwood. Mich. 1 Annæ.

(6)
1 Ld Raym. 328, 553.
Writ of Error in which
the Judgment was misre-
cited.

THE Plaintiff obtained Judgment in a *Scire facias* upon a Recognizance against the Bail, and now upon a Writ of Error brought, it was *Quod in adjudicatione executionis Judicii prædicti Error intervenit manifestus, &c.* adjudged this was naught, it should have been in *adjudicatione executionis Recognitionis prædicti*, because a *Recognizance* is not such a *Judgment* as might or would be intended on the Face of the Writ of Error.

King *versus* Ewer. Pasch. 1 Annæ B. R.

(7)
2 Ld. Raym. 756. Where
Et instead of Aut was re-
cited in the *Scire facias*.

IN a *Scire facias* upon a Recognizance removed by *Certiorari*, and upon Oyer entered in *hæc verba*, the Condition of the Recognizance recited in the *Scire facias* was, that the Defendant should give Notice of Trial *Prosecutori Et ejus Clerico*, whereas the Recognizance it self was, *Prosecutori Aut ejus Clerico*; and *per Curiam*, this is a Variance and quite different, so the Defendant had Judgment.

* P. 370

* Anonymous. Pasch. 5 Will. 3. B. R.

(8)
Between the Original and
the Declaration.

IN *Trespass* and Battery brought against Husband and Wife, the Original as it was recited in the Declaration was of a Battery only at one Time, but the Declaration itself was of several Batteries done by them at several Times, And the Defendant pleaded to the several Batteries, but the Plaintiff replied only as to one of them, and at the Trial had a Verdict, and upon a Motion to set it aside for this Variance, *per Curiam*, The Original being recited in the Declaration, but not set out upon Oyer craved, it shall be intended to be Right, but misrecited in the Top of the Declaration; and the Plaintiff's not Replying to the other Batteries is but a *Discontinuance*, which is helped by a Verdict.

Anonymous.

(9)
Antea, 2 S. P.

IN *Replevin*, The Writ was *Quare cepit averia*, and the Declaration was *Quare cepit unam equam. Et per Powell*, This Variance between the Writ and Declaration, is naught even after a Verdict, which *Treby* Chief Justice, denied; 'tis true 'tis naught upon a Demurrer, but 'tis cured by the *Oxford Act* after a Verdict.

* P. 371

* **Venire Facias.**

(1)
Sid. 100.

A *Venire facias ad respondendum* may be without a Day certain, because by an Appearance the Fault in this Process is aided, but a *Venire facias ad triand' exitum*, must be returnable on a Day certain.

(2)
1 Cro. 583. Sid. 99.

Upon an Indictment before *Justices of Peace in their Quarter-Sessions*, or before *Justices of Oyer and Terminer*, there must be *fifteen Days between the Teste and Return of the Venire facias*; but if the Entry be *ex assensu Partium*, then the *Venire facias* may be returnable *immediate* before the *Justices of Peace, &c.*

(1)
1 Cro. 448. Style 28,
29.

But before *Justices of Oyer and Terminer and Gaol-Delivery*, an Indictment may be found and tried the same Day, for they may award a *Venire facias* returnable *immediate*, and so may the King's Bench for all Offences done in *Middlesex*, that being the County in which that Court sits, but not for Offences done out of that County, because as to such 'tis not a Court of Oyer, &c.

(4)

Where an imperfect Verdict is given in an *Affize*, the same *Recognitors* may be summoned by Certificate of the *Affize* to explain that Verdict, because this is *festinum*

Verdict.

festinum Remedium, but in all other Cases, where the Jury come in by Process judicial, if an imperfect Verdict is received and recorded, no *alias Venire facias* or *Nisi prius* will lie for the same Jury, but there must be a *Venire facias de novo*; 'tis true, if a Jury is discharged upon a Demurrer to the Evidence, and without giving any Verdict, there an *alias Venire facias* will lie for the same Jury, but where a Verdict is set aside, there must be a *Venire facias de novo*, because the same Jury cannot stand indifferent to try the same Cause again. 3 Cro. 33. 8 Rep. 66. Allen 18.

A *Venire facias de Vicineto Villæ*, &c. is good in a superior Court, because their Jurisdiction is general, but 'tis not so in an inferior Court, because their Jurisdiction is circumscribed to the Vill only, therefore the *Venire facias* must be *de Villa*, and not *de Vicineto Villæ*, but this is contradicted by the later Authorities, for it shall be intended, that their Liberty extended beyond the Vill. (5) Noy 66. in Grefman's Case. † Jones 171. Latch. 208.

* Verdict.

* P. 372

IN a Special Verdict in *Trespass* brought against *Sir Rich. Cox Baronet, Rich. Cox, Esq*; and others; upon Not guilty, the Jury find a Warrant of a Justice of Peace, commanding the Constable to arrest the Plaintiff, *virtute cujus* he was arrested, and that the Constable required the other Defendants to assist him to convey the Plaintiff before a Justice of Peace, and that they brought him to the Constable's House, and that *prædictus Richardus Cox, Miles*, sent for the Constable, and commanded him to put the Plaintiff in the Stocks, whereas there was no such Person as *prædictus Richardus Cox, Miles*, beforementioned in the Record: *Et per Curiam*, this made the Verdict very uncertain. (1) Vaugh. 111, 117. Uncertain Verdict.

The Jury were charged at the Assizes with an Issue concerning a *Copyhold*, and one of them, after they were gone from the Bar, had a *Court-Roll*, and told the rest, that he knew the Matter, and that it was for the Plaintiff, but the other Eleven being of another Opinion before they saw the *Roll*, left the Matter to this Juror, and so they brought in a Verdict for the Plaintiff, but it was set aside, and a new Trial granted. (2) Sid. 203.

Cattle & al' *versus* Andrews. Hill. 5 Will. 3. Rot. 826.

ERROR of a Judgment in *C. B.* in an Action of *Trespass*, wherein the Plaintiff declared against the Defendant for several *Trespases*, (*viz.*) for Breaking and Entering his Close, Treading down his Grass, and Taking and Carrying away Water; the Defendant justifies as to all, upon which they were at Issue, and the Jury found him Not guilty as to the *Treading*, but gave no Verdict as to the other Matters, this was adjudged naught, and for this Cause the Judgment was reversed. (3) Not guilty as to Part, and they gave no Verdict as to the rest. 1 Inst. 227.

* Anonymous. Hill. 1697. at Guildhall, *coram* Holt Chief Justice. * P. 373

ASSUMPSIT against two, and there was Judgment by Default against one of them, the other pleaded Payment in Satisfaction of the whole Debt, but at the Trial proved only Payment of his Share: *Et per Holt Ch. Just.* If the Jury find a Discharge only as to this Defendant, they must find for the Plaintiff, and so they must, though they find the Payment was for the whole Debt, because the other Defendant hath confessed the Action, and the Finding of the Jury cannot discharge him, which was done accordingly, and small Damages given. (4) Where the Defendant confesseth the Action, the Finding of the Jury will not discharge him.

Verdicts shall not be taken so strictly as Pleadings, but the Substance of the Thing in Issue ought to be always found. (5) Jones 28, 61.

Verdict.

(6)
Where the Jury may give
a General or Special Ver-
dict.

In all Cases and in all Actions the Jury may give a General or Special Verdict, as well in Causes *Criminal* as *Civil*, and the Court ought to receive it, if pertinent to the Point in Issue, for if the Jury Doubt they may refer themselves to the Court, but are not bound so to do.

(7)
Variant from the Decla-
ration.

Where the Action is grounded on the Contract, if the Party mistakes the Sum, he fails in his Action, as for Instance, if he declare for a Horse of 20 *l.* and the Evidence is, that the Horse was sold for 10 *l.* or for twenty Marks, in such Case the Plaintiff shall not recover, because 'tis upon another Contract.

(8)
2 Cro. 380. Cro. Eliz.
147. Moor 466. Sid. 5.
2 Vent. 151, 223,

But 'tis otherwise if the Plaintiff declare upon a Promise in Law, or where the Action is grounded on a *Tort*, as if an Action of Debt is brought for the Escape of the Husband and Wife, and the Jury find, that the Wife only was in Execution and escaped, the Plaintiff shall have Judgment.

(9)
Allen 28. Baker's Case.

Case, &c. In which the Plaintiff declared, that the Defendant was indebted to *W. R.* in 40 *l.* who became a Bankrupt, and that the Commissioners assigned *Debita in quadam Scheda annexa continen' præd' summam* 40 *l.* to the Plaintiff, whereby the Defendant became indebted to the Plaintiff in 40 *l.* and being so indebted, promised to pay, and upon the Evidence the Jury found the Defendant was indebted to the Bankrupt in 30 *l.* only, so that the Sum of 40 *l.* for which the Plaintiff had declared, was never assigned to him, nor promised to be paid; but adjudged, that it was no worse in the Plaintiff than if the Bankrupt himself, before he became Bankrupt, had brought the Action; and * the Difference is between an Action on a Promise in Law as in the principal Case, and an Action brought upon the Contract itself; for in the first Case, a *Mistake in the Sum* doth not hurt, but in the other Case it doth.

* P. 374

(10)
Where Part of the Issue is
only found and finding,
but not pursuant to the
Issue. 1 Inst. 227. Cro.
Eliz. 133.

A Verdict, which finds *Part only of the Issue*, is void as to the Whole, as for Instance, an Information was brought for intruding into one Messuage, and an Acre of Land, and the Jury found the Defendant Not guilty as to the Land, and said nothing of the Messuage, this was adjudged ill, as to the Whole.

(11)
Dyer 75. Allen 31.

Case &c. for saying the Plaintiff had the *French Pox*, and *that he was*, &c. the Jury find all the Words in the Declaration, except those, *That he had the French Pox*, adjudged ill for that Reason.

(12)
Sid. 99.

So where the Defendant was indicted for a forcible Entry and Detainer, the Jury found the Entry peaceable, but said nothing as to the *Detainer*; but if they had found the Entry peaceable, and the Detainer by Force, it had been good.

(13)

But where the Defendant was indicted for forging and *publishing*, and he was found guilty *de transgressionem*, and of the Forgery aforesaid, though nothing was said of the *Publishing*, yet the Verdict is good, because the Words *de transgressionem prædicta* includes it.

(14)
2 Lev. 111. Rex. v. Nor-
ton.

So in *Trespas* for an Assault and Battery, and the Jury found the Defendant guilty *de transgressionem*, and Assault, and said nothing as to the Battery, adjudged good, for the Word *Transgressio* includes the Battery.

(15)
Sid. 234.

Action of the Case for Words, upon Not guilty pleaded, the Jury found that the Defendant *non locutus est verba*, &c. adjudged ill.

(16)

So in *Trespas*, upon Not guilty pleaded, the Jury found, that the Plaintiff *non damnificatus fuit*, this is ill, because it doth not answer the Plaintiff's Charge.

(17)
Yelv. 78, 79.

So in *Assumpsit*, and *Non Assumpsit* pleaded, the Jury found, that the Plaintiff was *damniſied* 10 *l.* by the Defendant's Non-performing his Promise; this is ill, because it doth not directly answer the Issue, but by Implication.

Verdict.

So if the Issue be *solvit ad diem*, &c. and the Jury find *quod debet*, 'tis ill.

(18)
1 Roll. Rep. 257. Baugh's Case.

* The Defendant pleaded *plene Administravit*, and the Jury found that he had Goods in his Hands, but did not find to what Value, adjudged ill; because the Plaintiff must recover according to the Value of the Assets found; but if Action of Debt is brought against an *Heir*, and he pleads *Riens per Descend*, and the Jury find that Lands in Fee descended to him, but not to what Value, the Verdict is good, because a General Judgment shall be given, and not according to the Value of the Land.

(19)
Uncertain and imperfect, and where more or less is found. 1 Roll. Rep. 274. Evett's Case. * P. 375

Trespass against Husband and Wife, in which the Plaintiff *inter alia* declared, that they beat his Mare: Upon Not guilty pleaded, the Jury found, that the Wife did beat the Mare, and *as to the Residue*, &c. they found for the Defendant; adjudged, that this was an imperfect Verdict, as to the *Husband*, for it neither acquits or condemns him, for the Finding *as to the Residue*, extends only to the other *Trespases*.

(20)
Yelv. 106.

A Verdict found, that *W. R.* the Copyholder did bargain and sell to the Lord of the Manor all the Lands which he purchased of *W. W.* and did not find what Lands, or that they were purchased of *W. W.* and for that Reason adjudged ill.

(21)
Jones 42. Blenerhasset's Case.

In *Trespass*, the Defendant pleaded a Custom, &c. which being traversed by the Plaintiff, the Jury found the Custom Specially, but Variant from that which was pleaded, concluding their Verdict *quod, si super totam materiam*, &c. they find the Defendant guilty, *si aliter*, &c. then they find him Not guilty. *Et per Curiam*, a *Venire facias De novo* was awarded, because there was no Verdict found upon this Issue, there being no Conclusion upon the Point in Issue.

(22)
Cro. 37 Eliz. 415. Bora-
ston's Case.

In a *Quare Impedit* a Special Verdict found an Instrument under the Seal of the Bishop with this Indorsement (*viz.*) *A Resignation was acknowledged and accepted by the Bishop*; adjudged this was not a Finding a *Resignation in Fact*, but only Evidence of a *Resignation*; so if instead of Finding a Feoffment the Jury should find there was a Charter and *Livery* indorsed; 'tis ill.

(23)
Noy 147. Smith v. Fowkes.

A Verdict, which finds *more than is in Issue*, is void *quoad* that, because 'tis not within the Charge or Commission of the Jury; as for Instance, if a Man bring an Action of * Debt, and declares for 20 *l.* and the Jury, upon *nil debet* pleaded, find, that the Defendant owed 40 *l.* this is ill, for the Plaintiff cannot recover more than he demands, and in this Case he cannot recover what he demands, because the Court cannot sever their Judgment from the Verdict.

(24)
Where a Verdict finds more than in Issue, 'tis void. * P. 376

In *Trespass* for taking his *Gown and Manteau* a Special Verdict found, that the Defendant as Constable took the Gown for a *Tax*, but found nothing as to the *Manteau*; *per Curiam*, this is a *Discontinuance* as to the whole.

(25)
3 Lev. 55.

Assault and Battery by Husband and Wife: Upon Not guilty pleaded, the Jury found, that the Defendant was guilty as to *Beating the Wife*, and nothing was said of the *Husband*. *Et per Curiam*, This Verdict is void, because only Part of the Issue was found.

(26)
Hard. 166.

In an Action of Debt for Rent, the Defendant pleaded, *nil debet modo & forma prout*, as the Plaintiff had declared, upon which they were at Issue, and the Verdict found, *quod nil debet modo & forma*, as the Plaintiff had declared; and upon a Writ of Error brought, this was assigned for Error, to make the whole Verdict void, for the Plaintiff did not declare, that *Nil debet modo & forma*, &c. he declared, *Quod debet*. But *per Curiam*, the *modo & forma*, and what follows shall be rejected, and so *nil debet* shall stand alone to make the Verdict good.

(27)
Sid. 357.

* P. 377

(1)
Vicar, where he had no
Freehold.

(2)
Vicarage endowed.

(3)
What is a Rectory. 2 Leon.
10, 11. Sid. 91. contra.

* P. 378

What is the Glebe.

(4)
Vicar is endowed out of
the Rectory. Vent. 15.

(5)
Libel by a Vicar to have
his Vicarage augmented.

* Vicar and Vicarage. See Burn's Eccl. Law, Tit.
Vicarages.

AT Common Law, the *Vicar had no Freehold*, and so it continued till 9 Ed. 3. which gave him a *juris utrum*, and therefore it hath been held, that Lands might be given by the *Rector to the Vicar*, because the Freehold still continued in the *Rector*; but a Stranger could not give Lands to the *Vicar*, because in such Case he would have a *Freehold*, and that would be in *Mortmain*.

And as to this Matter there is a remarkable Case, *Anno 40 Ed. 3. 29, 30. ff.* A *Vicar* brought a *juris utrum* of a *Carve* of Lands, to try whether it was the Freehold of the *Vicar*, or the Lay Fee of the *Prior*, the Defendant pleaded, that he was *Parson of the Vicarage*, and prayed Judgment if the Court would take Cognizance of this Matter; and it was objected, that the *Vicarage* being derived out of the *Rectory*, and that by the Act and Concurrence of the Ordinary; and it being a Thing so far depending on the Ordinary, that he might either decrease the *Vicarage* and add to the *Rectory*, or decrease the *Rectory* and add to the *Vicarage*, that the Endowment of the *Vicarage* and how much belonged to it was a Spiritual Thing, and belonged to the Ordinary; that one Parson cannot give to another Parson without Licence. *Sed per Curiam*, the Thing in Demand is a Matter of Freehold, which cannot be tried by the Ordinary, especially, there being a Warranty and the Act of a Stranger in the Case; 'tis true, heretofore it was held, that a *Vicar* could not maintain an Action against the *Rector*, but that was when the *Vicar* had no certain Estate in his Possessions; but now the Law is altered, for the *Vicar* is endowed to him and his Successors in Severalty, which is a fixed Estate, and therefore he may maintain an *Affize* against the *Rector*, as well as against a Stranger; and it may be that the Lands in Question were not derived from the *Rectory*, and assigned by the Ordinary to the *Vicarage*, but given and annexed to it by a Lay Stranger.

As concerning a *Rectory*, 'tis an aggregate Inheritance, and must consist of Lands as well as *Tithes*, there must be the Church and Churchyard at least, and therefore where the Plaintiff declares of a *Rectory*, he must prove more than *Tithes*; but yet a *Rectory* may be without *Glebe*, for the *Rector* may have conveyed * away his *Glebe*, and there are many Compositions between the *Rector* or *Vicar*, by which all the *Tithes* and *Glebe* are conveyed to the *Vicar*, reserving only a Rent to the Parson, and the *Glebe*, originally considered, was only an Additament *ex dono fundatoris*, and the Common Law upon the Creation of a Parson, gives him nothing but the *Tithes*.

Smith versus Waller. Trin. 12 Will. 3. B. R.

WHERE the *Vicar is endowed*, and comes in by *Institution* and *Induction*, he hath *curam animarum actualiter*, and is not to be removed at the Pleasure of the *Rector*, who in this Case hath only *curam animarum habitualiter*; but where the *Vicar* is not endowed nor comes in by *Institution* and *Induction*, the *Rector* hath *curam animarum actualiter*, and may remove the *Vicar* at pleasure; and where a *Vicar is endowed*, 'tis always out of the *Rectory*, and by the Act of the Ordinary; therefore where the Question is, whether it be a *Vicarage* or not, it shall be tried in the *Spiritual Court*, because it could not begin or be created but by the Ordinary, and with his Concurrence, and so 'tis of an *Appropriation*.

Lutton versus King.

BEFORE the Statute 31 H. 8. a *Vicar* might libel in the *Spiritual Court* for an *Augmentation of his Vicarage*; for upon the Creation of *Vicarages*, that Power was commonly reserved, and where it was not reserved the *Bishop* could not augment them, and Libels for that Purpose were frequently exhibited against *Impropriators*; but now since by that Statute *Impropriations* are made *Lay Fees*, the Ordinary cannot intermeddle, neither could they have sued for *Tithes* in the

Vifitation and Vifitor.

the Spiritual Court, if that Power was not particularly faved to them by the Statute: But there feems to be a Difference where a *Vicar* fues a *Lay Impropiator*, and where the *Impropiator* is a *Spiritual Person*, for in the laft Cafe 'tis probable he may fue for an *Augmentation*; and in fome Cafes, where the Impropiation is not a *Lay Fee*, as in the Cafe of the *Chorifters of Salisbury*, where the Appropriation of a Parfonage was made to them before the Statute, and continues fo ftill, and in fuch Cafe the Bifhop may make an *Augmentation*; if that Power is referved, for the Perfons are fubject to his Command.

* A *Vicar* libelled for Tithes of *Wood*, the Defendant fuggelted for a Prohibition, that Time out of Mind they had paid no fmall Tithes to the *Vicar*, but that by the Custom of the Parifh they were paid to the *Parfon*: *Per Curiam*, if the Endowment of the Vicarage is loft, the Tithes muft be paid according to Custom. (6) 1 Mod. 50. Where the Endowment is loft, the Tithes muft be paid according to Custom. * P. 379

Vifitation and Vifitor.

See the Cafe of Proxies, Davies, 1.

PROXIES or *Procuracies*, fo called by the *Canonifts*, becaufe upon every Vifitation by the Bifhop, the Parfon or Church vifited were to procure neceffary Provilions for the *Vifitor*, and this Provilion was originally in *efculentis* & *poculentis*, but as our Socage, which was fo many Days ploughing the Lord's Land, came in Time to be converted into certain Payments of Money, fo this Provilion was changed into a certain Sum of Money paid to the Ordinary, as being *de jure*, *Vifitor* of all Churches within his Diocefe; and being thus fettled, it was paid and became due, whether there was actually any Vifitation, or not, as that Rent, which the Tenant was to pay in Lieu of his *Socage Service*, came in Time to be due and demandable, whether the Lord had Demefnes to plough or not. (1) What are Procurations.

These *Proxies* are now Part of the fettled Revenue of the Bifhop's See, the King himfelf pays them for his *Appropriations*, as the Abbeyes did before the Difolution, when they had appropriated Churches. (2) Procurations are Part of the Bifhop's Revenue.

The *Commissary*, at his Court of Vifitation, cannot cite *Lay Parifhioners*, unlefs only *Churchwardens* and *Sidesmen*, and to thefe he may give his Articles, and inquire by them. (3) Noy 123.

The *Archbifhop* of *Canterbury* never vifits the *Diocefe* of *London*, this is by Agreement between them; and in Confideration thereof, if a Cafe arifes within the *Diocefe* of *London*, and the Suit is brought in the Arches before the *Archbifhop*, though this is *per Saltum*, yet the *Bifhop* of *London* is to allow it. (4) 1 Cro. 340. The *Archbifhop* never Vifits the *Diocefe* of *London*.

* As to Vifitors of Lay Foundations, they are either by Appointment of the Founder, or by Implication of Law, thofe which are by Appointment, are fuch to whom the Founder delegates that Power. (5) Of Vifitors of Lay Foundations: * P. 380

By Implication of Law, the Founder and his Heirs are Vifitors, if no particular Perfon is appointed; and this is a Refervation the Law makes to him in Lieu of the Land which he parted withal; and as the Foundation is a Creature of his own, fo 'tis reasonable, that it fhould be vifited by his Heirs, to fee that the Charity of their Anceftor is not perverted. (6) The Founder and his Heirs are Vifitors.

Corporations aggregate and intituted by private Charity, if they are Lay, they are vifitable by the Founder, or by whom he appoints, and from the Sentence of fuch Vifitor there lies no Appeal. (7)

But if Spiritual, 'tis vifitable by the Ordinary, and from his Sentence an Appeal lies. *Show. 46. Quare.* (8)

Uisne.

Wilson *versus* Laws. Pasch. 6 Will. 3. B. R. 1 Ld. Raym. 20. S. C.

(1)
1 Salk. 1 Roll. Rep. 28.
Moor 559. 3 Cro. 282,
898. 2 Inst. 319.

IN an *Appeal of Murder*, it was objected, that the Fact was laid in the *Parish* of St. Giles in the Fields, when it should be in the *Vill*, as it ought to be in the Statute of Gloucester: *Sed non allocatur*, for the *Parish* shall be intended a *Vill*, and there is no Difference between a *Parish* and a *Vill*; 'tis true a *Parish* may contain more *Vills* than one, but that shall not be intended, unless shewn.

Booth *versus* Johnson. Hill. 1 Annæ.

(2)
Where a Place which is no
Vill shall be intended to
be a Vill, after a Demurrer,
or Verdict.
* P. 381

WHERE the Plaintiff in his Declaration lays the *Visue* in Gray's Inn or Whitehall, which are no *Vills*, yet after a Verdict or Demurrer they shall be intended to be *Vills*, and therefore, if the Defendant will take any Advantage, he must plead no such *Vill* as Gray's Inn, &c.

The Queen *versus* Inhabitants of Wilts. Trin. 3 Annæ.

(3)

IN an Information against the County of Wilts, for not repairing Laycock Bridge, the Court held that the Attorney-General might take a *Venire facias* to any adjacent County; and that it might be *de corpore* of the Whole, or *de Vicineto* of some particular Place therein next adjoining.

Way *versus* Gally. Trin. 3 Annæ, B. R.

(4)
Mod. Cases 194. 2 Salk.
651. 2 Salk. 651.
† 6. Rep. 46.

THE Lessor brought an Action of *Debt* against the Lessee for *Rent*, upon a Demise of Lands in *Jamaica*, and laid his Action in *London*; the Defendant pleaded, that the Lands were in *Jamaica*, and that there are Courts there, &c. adjudged upon Demurrer that this Plea is ill; but if in any Action laid here, a local Issue should arise (as suppose in *Ireland*) it may be tried in the County where the Action is laid, according to *Dowdale's Case*, or a Suggestion may be entered on the Roll, that such a Place in such a County lies next to *Ireland*, and so have a Jury from thence.

Anonymous.

(5)
Where the Want of a *Venue*
is cured.

RULED, that the Want of a *Venue* is only curable by such a Plea which admits the Fact for the Trial whereof it was necessary to lay a *Venue*: The Plaintiff declared on a Bond, and laid *no Venue*, the Defendant pleads a *Release*, now by this Plea the Want of a *Venue* is cured; *aliter* if he had demurred; *quare*, if he had pleaded *Non est factum*.

* P. 382

* Union.

(1)
Though by an Union both
Churches are one Parish,
yet as to Taxes and Re-
pairs they are several.

BY an *Union*, both Churches become one, and one *Parish*, one *Benefice*, and one *Advowson*, but as to Taxes and Repairs, they are several, for otherwise it might be prejudicial, because the old Church may be less in Proportion than the new, to which 'tis united.

(2)
Who may make an Union.

Where the Churches are poor and void, the Patron and Ordinary might make an *Union* without the King, but not if they were rich; for an *Advowson* lying in Tenure, the King hath a Possibility of an *Escheat*, *Lapse*, &c. which could not be lost without his Consent.

If

Universities.

If the Church is full, then both *Parson*, *Patron*, and *Ordinary* must consent to an Union. (3)

In a *Quare impedit*, the Defendant pleaded a Dispensation for two Benefices, 3 Cro. 719. (4)
and upon Oyer of the Letters Patents of Dispensation, it was thus :

¶ It took Notice, that there were two Benefices, and of small Value, there- The Form of an Union. (5)
fore *Unimus, incorporamus & anneximus*, the one to the other, for the Life of W. R. the present Incumbent; it was objected, that here were no Words of Dispensation, and therefore this Clause cannot enure as a Dispensation, neither can it be an Union, because it is done by the King alone, without the Concurrence of the Patron and Ordinary: *Sed per Curiam*, though there cannot be a perpetual Union without such Concurrence, because 'tis a Loss both to Patron and Ordinary, yet there may be a temporary Union, as in this Case, for the Life of the Incumbent, and this might be done by the *Metropolitan* alone; for after the Death of the Incumbent, the Union is dissolved, and no loss accrues, either to the Patron or Ordinary in the mean Time, for the one hath his Presentation and the other his Admission, and this is a complete Dispensation, and allowed by the Statute 31 & 37 H. 8. cap. 21. (viz.) Any License, Union, or Dispensation to the contrary.

* Universities.

* P. 383

OCTOGINTA *Dame* apud *atium* Oxford' dat' cla. 19 Ed 1. Memb. 6. v. 3. (1)

Strata Civitatis mandat' per breve Regis emendari per Burgenses Oxon' & quod porcuaria destruantur. Claus. 29 Ed. 1. Memb. 14. D. 2. (2)

Breve Regis ne iusta & alia facta armorum fiant prope Oxon' ne quies Scholar' impediatur. Claus. 33. Ed. 1. Memb. 2. D. 1. Memb. 3. v. 2. (3)

Breve Majori & ballivis Oxon' de Affisa panis & vini observand' & de rationabili precio super victualia imponend' sicut per Juramentum Cancellario & Procuratoribus asringuntur. Claus. 33 Ed. 1. Memb. 18. D. 2. (4)

The University of Oxford hath Jurisdiction in all *Trespases, Injuries, Quarrels*, Where they have Jurisdiction, and hewre not. (5)
Crimes and Matters whatsoever which do not concern *Life or Freehold*.

But an *Ejectment* for the Right of a *Chattel real*; as for Instance, of a *Lease for Years* shall not be determined there, for though a *Freehold* is not recovered, yet the Land is drawn from him who perhaps might have the *Freehold*. (6)

Neither have they any Jurisdiction, unless the Plaintiff or Defendant be a *Scho-* Cro. Car. 73, 88.
lar or a *Servant* of the University, or of some *College*, but if either of them is a Scholar, 'tis then a Matter within their Jurisdiction; but yet, if either of them is entered into a *College* by a Trick to avoid a Suit in *B. R.* or to excuse himself 2 Vent. 106.
from Town Offices, their Privilege shall not be allowed. (7)

The University demanded *Consuance* of a Suit brought in the *Exchequer* by *Quo* Hard. 505. (8)
minus, and it was allowed.

Debt against the Defendant, a *Townsmen* in *Oxford*, for refusing to execute 2 Vent. 106. (9)
an Office in the Corporation: It was moved, that he being a *Servant* to Dr. *Irish*, might have the Privilege of the University, and a Charter was produced by which it * was granted, that the Members and Servants of the University * P. 384
should be sued in the Vicechancellor's Court, and not elsewhere; and a *Certificate* from the Chancellor, directed to the *Chief Justice*, that the Defendant was matriculated and registered in the University; but it appearing to the Court, that this was done two Days, and no more, before he was chosen to this Office, and that he was a *Painter* by Trade, and had lived several Years in the Corporation,

Uses.

tion, and no Servant attending *Dr. Irish*, the Privilege of the University was not allowed.

Uses.

(1)

US E S were not at Common Law, neither were they ever mentioned till the Reign of *R. 2.* and therefore there is no Remedy at Law for them.

(2)

1 Rep. 126, 129, 187, 133.

But yet the *Estate and Limitation of an Use* ought to be governed and directed by the Rules of Common Law; and there is no Difference between Estates conveyed by Way of *Use* and by Way of Possession.

(3)

Where a Man intends to pass an Estate at and by a Common Law Conveyance; it shall never take Effect as a *Covenant to stand seised*, or as a Conveyance upon the *Statute of Uses*.

(4)

1 Inst. 49.

As for Instance, if by Deed I give, grant and *enfeoff* my Son, &c. with a *Letter of Attorney to make Livery*, this shall not enure as a *Covenant to stand seised*; but it might have been otherwise, if there had been no *Letter of Attorney* in the Deed.

(5)

See *Samms v. Jones*.

The Father being seised of a Reversion, granted and confirmed the same to his Son, to the *Use of himself for Life, Remainder to his Son*, without any Attornment, this Conveyance is void; yet if there had been no *Limitation of the Use*, this Deed might have enured as a *Covenant to stand seised*.

(6)

See *Hore v. Dix*.
* P. 385.

So where by Deed between the Father and Son of the one Part, and *W. R.* of the other Part; the Father did give, grant * and *enfeoff W. R.* to the Use of his Son, there being no *Livery*, this is a void Conveyance.

(7)

Now as to Considerations to raise an Use, the Cases are, if the Conveyance is by Way of Covenant, the Consideration must be either *natural Affection* or *Marriage*.

(8)

If 'tis by *Bargain and Sale*, then the Consideration must be *Money*.

(9)

Therefore a *Covenant to stand seised* to the Use of his Son and his Wife, whom he shall marry, this is good.

(10)

But a *Covenant to stand seised* to the Use of himself for Life, Remainder over, with a Power to let Leases for forty Years to Persons who are Strangers; this is not good as to the Strangers, because they are not privy to the Consideration; but if it had been to make Leases to any of his Children or Kindred, it had been good.

(11)

1 Cro. 530.

So a *Covenant to stand seised* to the Use of *A. and B. and C. his Brother*, this is good as to the Brother, and it is entirely in him, but void as to the other two, because not privy to the Consideration.

(12)

In a *Covenant to stand seised*, the Word *Covenant* is but *declaratory*; therefore, if the Father by Deed sets forth, that he stands seised to the Use of his Son, and doth not covenant to stand seised, yet 'tis a good Covenant.

(13)

See *Buckley v. Simonds*.

So if by Deed the Father grants his Lands to his Son in Tail, this is a good *Covenant to stand seised*.

(14)

For if the Word *Covenant* was obligatory, the Deed should not enure as a *Covenant to stand seised*.

Therefore

Uses.

Therefore if the Father *covenants*, that his Lands shall go, remain and descend to his Son after his Decease, or that he will convey to his Son, this is not a Covenant to stand seised, for 'tis only obligatory to a future Thing.

(15)

But if the Father *covenants to stand seised* to the Use of the Son, and to do any Act for farther Assurance, or to levy a Fine to the Use of his Son in Tail, and that if not levied before such a Time, that then he will stand seised to his Use, this shall enure as a Covenant to stand seised.

(16)

* It has been already said, that there were no such Things, as *Uses at Common Law*; the Reason was, because the Feoffee was always taken as the Owner of the Land, and that it was very inconvenient and absurd, that there should be two several Fees, and Owners of the same Land *simul & semel*, therefore at Common Law the Feoffees to Uses were the very Tenants, and had a right to forfeit.

(17)
* P. 386

But the Statute to remedy this Inconvenience hath united the Estate to the Use; so that now the Feoffees to Uses have no Estate or Interest at all, but in Respect of the contingent Estates and Uses limited in the Deed.

(18)

And this is neither a naked Authority, nor a mere Estate which they have, but *aliquid medium* between the Estate and Authority, they have *scintilla juris* and a *possibilitas usus emergentis*.

(19)

Some Questions have been made, out of what an Use shall arise; as for Instance, it hath been held, that Uses shall be raised only out of a Freehold, that they cannot be raised out of a Chattel, because that is in Nature of a Trust, nor out of an Use, nor out of a bare Right, nor out of an intended Purchase; as where a Man covenants to stand seised of Lands which he intends to purchase, Moor 509. nor out of such Things which *ipso usu consumuntur*, as Commons, &c.

(20)

But *Rents, Liberties and Franchises*, and such *Local Inheritances*, may be granted to Use; but not mere personal Inheritances, as Annuities.

(21)

Where a *Feoffment* is made without express Use or Consideration, there the Use shall be in the Feoffor by Implication of Law; but 'tis otherwise where a Man makes a Gift in Tail, for there is a Tenure, which is a Consideration.

(22)

Lamplugh *versus* Shotterell. Pasch. 1 Annæ. B. R. 2 Ld. Raym. 798. S. C.

THE Case was, a *Bargain and Sale* was made for a Year in Consideration of 5 s. paid, and thereupon a Release to the Bargainee and his Heirs, without expressing any Consideration, the Question was, whether the Use should result to the Bargainor, and it was insisted, that it should not, because the Release doth but enlarge the first Estate, and that is to the * Use of the Bargainee, and both are but as one Conveyance, and the 5 s. mentioned in the Lease, extends to the Release, and the *Quantum* of the Consideration is not material, for a Penny is sufficient; but on the other Side it was argued, that this Conveyance is in Nature of a Feoffment, upon which an Use shall result to the Feoffor where no Consideration is expressed.

(23)
2 Salk. 678. S. C. Farr.
71. Where an Use shall result.

* P. 387

Holt Ch. Just. Before the Statute of * Uses there might be a Reason why an Use should result upon a Feoffment, for it put the Estate out of the Feoffor, and he had only a Trust left which could not be forfeited; and to this Purpose such Feoffments were made, but this cannot be since the Statute; for if an Use must result to the Feoffor, and the Estate must be executed to the Use, the Feoffment is in vain, and the Party hath made a Conveyance to no Manner of Purpose, being in of the same Estate as he was before he made the Feoffment; and so it is of a Lease and Release, but it is otherwise upon a Fine or Recovery, for they may have their particular Estate in other Respects, as barring upon Nonclaims or Remainders.

(24)
* 27 H. 8.

Usurpation.

So it is if by Feoffment or by Lease and Release, a Man conveys any particular Estate mediate or immediate, to another Person, there the Residue of the Estate shall, by Implication of Law, remain in the Party himself; but where no Estate is limited to another, there the whole Conveyance is to no Purpose, if the Party be construed to have the resulting Use in him.

(25)
1 Mod. 262. 2 Vent.
35. 2 Mod. 249. What
is a good Consideration to
raise an Use.

In a Special Verdict in Ejectment, the only Point was, whether a Lease for a Year, made upon no other Consideration than the Reservation of a Pepper-Corn, shall operate as a Bargain and Sale, and make the Lessee capable to take a Release; *Et per Curiam*, it shall, for the Reservation of a Pepper-Corn is a sufficient Consideration to raise an Use.

* P. 388

* Usurpation.

(1)

AT Common Law the Patron in Fee was put out of Possession by an Usurpation, and though he might recover the Advowson it self by a Writ of Right, yet he had no Remedy for the Presentation *hac vice*, nor if another Avoidance happen, unless he brought his Writ of Right, and recontinued the Advowson.

(2)

If the Patron had the Advowson in Tail, or for Life, this Turn, and also his whole Advowson was gone.

(3)

If an Usurpation was made upon Tenant by the Curtesy, or in Dower, or upon a Lessee for Years, or upon a Bishop in Time of a Vacancy, neither the Heir or he in Reversion, or Successor, could present at the next Term, but now this is altered by the Statute, and the Law is.

(4)

That if there be an Usurpation upon a Patron in Fee, he may bring a *Quare Impedit* for the present Turn, but then it must be brought within six Months, otherwise he is put to his Writ of Right of Advowson.

(5)

But if he is only Patron for Life, and doth not bring his *Quare Impedit* within six Months, he hath lost his Advowson for ever, for his Interest is discontinued, and he cannot present or maintain a *Quare Impedit* for the next Turn, being out of Possession, and a Writ of Right will not lie, therefore the Estate in Reversion is discharged of that Interest, but he in Reversion may have a Writ of Right.

(6)

If there is an Usurpation on a Tenant in Dower, or Tenant by the Curtesy or Guardian, and six Months pass after the particular Estates are determined, and the Heir comes of Age, the Heir may maintain a *Quare Impedit*, or present to the next Avoidance; and if he doth not, then he is put to his Writ of Right.

(7)

And so it is if the Ancestor grant the Advowson for Life or Years, and an Usurpation is made, the Heir may maintain a *Quare Impedit* for the next Avoidance, as his Ancestor might have done; so it is of a Successor, for a Reversion by Descent, * and a Succession are within the Statute, but a Reversion by Purchase is not.

* P. 389

(8)

Upon the Statute 1 Eliz. if an Usurpation be on a Bishop, it shall bind him, because he suffered it; but his Successor may present to the next Avoidance, or bring a *Quare Impedit*, though he is out of Possession. Jones 46.

(9)

An Usurpation cannot put the King out of Possession of his Land, much less divest an Inheritance out of him, therefore it cannot divest the Inheritance of an Advowson out of him, for nothing can go out of him without a Record, no more than it can come to him.

(10)

But an Usurpation may dispossess him of his Presentation, (i. e.) it may bind his Possession, so as he cannot remove the Incumbent, without a *Quare Impedit*, though it cannot so divest his Estate in an Advowson as to bind his Inheritance and put him to a Writ of Right, &c.

Usury.

Mugg *versus* Brown. Pasch. 12 Will. 3. B. R.

(11)
IF an Incumbent be in by Usurpation on the King, and would be confirmed, he must not procure a new Presentation from the King, because that would be void, the Church being full; but he must get the King's Letters Patents reciting the whole Matter, and therein granting the Church to him: And *per Holt* Ch. Just. these are called *Letters Patenis ad corroborandum*.
1 Salk. 161. S. C. Of Letters Patents ad corroborandum.

(12)
An Usurpation upon a Lessee for Years gains the Fee-simple, and puts the true Patron out of Possession, and though by the Statute of *Westm. 2.* he in Reversion after the Determination of the Lease for Years, may have a *Quare Impedit* when the Church is void, or may present, and if his Clerk is instituted and inducted, then he is remitted to his former Title, yet till that is done, the Usurper hath the Fee, and the Writ of Right of Advowson lies against him.
Hutt. 66. Usurpation on Lessee for Years.

(13)
Quare Impedit, the Defendant pleaded an Usurpation made by the Queen after the Death of the last Incumbent, and that her Clerk was admitted, instituted and inducted, and was in Possession for six Months; the Plaintiff replied and set forth, that the Patron had brought a *Quare Impedit* against him who was Incumbent upon the Queen's Presentation, and had Judgment against him by Default: And *per Curiam*, by this Judgment * the Patron was remitted to his former Right; but it had been otherwise if the Queen had presented on a Deprivation, for there the Patron must have six Months to present after Notice of the Deprivation.
3 Bull. 38.
* P. 390

Usury. See Indictment 8.

(1)
THERE must be a corrupt Agreement for more than Statute Interest, otherwise 'tis not Usury, and the Defendant shall not be punished, unless he * receive some Part of the Money in Affirmance of the usurious Agreement, for 'tis the Receipt and not the Contract which makes him punishable.
2 Cro. 677. Cro. Car. 101. Noy 143. 2 Vent. 83.
* Noy 133.

(2)
Interest upon *Bottomry-Bonds*, which is *fenus nauticum*, or *Usura maritima*, is not within the Statute.

Mason *versus* Abdy. Trin. 1 Will. 3. B. R.

(3)
THE Obligor was bound in a Bond of 300*l.* conditioned to pay 22*l.* 10*s.* Premium, at the End of the first three Months after the Date, &c. and Sixpence in the Pound at the End of six Months, as a farther Premium, together with the Principal itself, in Case the Obligor be then living, but if he die within that Time, then the Principal to be lost, adjudged this is an usurious Contract, because there was a Possibility that the Obligor might live so long; and there is an express Provision to have the Principal again.
What is an usurious Contract.

(4)
Debt upon Bond, dated 24 May, conditioned to pay 300*l.* on the 25th Day of February, &c. The Defendant pleaded in Bar, that after the making the said Bond, (viz.) such a Day the Plaintiff corrupte receipt of the Defendant 30*l.* for the Use of the said 300*l.* for one Year, (viz.) from such a Day to such a Day, which is more than six per Cent. per Annum, contra formam Statuti; and upon a Demurrer to this Plea it was adjudged ill, because the * Statute makes all Bonds void, where Money is * lent upon or for Usury, and where more is taken, than after the Rate of six per Cent. But this Bond doth not appear to be for Money lent upon or for Usury, but for Payment * of a just Debt, and if there is an usurious Contract † after the Bond made, that shall not affect the Bond to make it void, because it was good at the Time it was made; but by the later Clause of the Statute such an Usurious Contract is punishable by Forfeiture of treble the Value.
1 Saund. 294. Where corrupte receipt is no good Plea.
12 Car. 2. cap. 13.
* Postea 6. S. P.
* P. 391
† Post. 5. P. S.

Information

Way.

(5)
Raym. 196. 1 Mod. 69.

* Antea 4 S. P.

(6)
Sid. 421. Where Judgment cannot be given upon the Statute it shall be given as at Common Law.

(7)
Lutw. Grange's Case. Where the Statute was not pleaded, the Bond, though Usurious, is good.

(8)
What Contract for extraordinary Interest is good, and what not.

Information was brought upon the same Statute, setting forth, that the Defendant 16 Novemb. 20 Car. 2. lent W. R. 20 l. till June following, which is six Months, and that afterwards, (viz.) *Ad finem Termini prædicti*, he took of the Plaintiff *corrupte & extorsive* thirty Shillings for the Loan thereof, which is more than allowed by the Statute: Upon Not guilty pleaded, the Jury found for the Informer; but the Judgment was set aside, because it appears, that this corrupt Agreement was made * *ad finem Termini*, when by the Statute it must be at the *Time of the Contract made*, and if the Contract is not then Usurious, the Assurance is not void; but the Borrower shall have treble the Value, as forfeited by the Statute.

Information against the Defendant, for that he on the 30th of May, &c. by Way of *Corrupt Contract and Agreement*, *cepit & ad lucrum suum convertit* 40 s. for deferring the Day of Payment of 25 l. from the 29th of July to the 30th of May (which was the Day on which he took the 40 s. *contra formam Statuti*, after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that it did not appear by this Information that the 25 l. was Money lent; but if it had 'tis ill, because the Taking the 40 s. was after the Lending, and there was no corrupt Agreement laid either before or at the Lending. *Sed per Curiam*, if upon this Information Judgment cannot be given on the Statute to pay *treble the Money* taken, yet being found, that the Defendant took 40 s. by a corrupt Agreement, Judgment shall be given against him at Common Law, which is *Fine and Imprisonment*.

Debt upon Bond conditioned, that in Consideration of 12 l. paid by the Plaintiff to the Defendant, he became bound to pay the said Plaintiff 14 l. *if he lived six Months after the Date of the Bond*; there was a Plea and Demurrer, and it was objected, that it appears by the very Condition of this Bond, that the Contract was Usurious, it being to pay 14 l. for 12 l. in six Months after the Date of the Bond; 'tis true, this might have made the Bond void, if the Statute had been pleaded, but that not being done, this Objection comes too late.

The Distinction in the Books is, that where the Principal and Interest are both in Danger of being lost, there the Contract for extraordinary Interest is not *Usurious*; but where the Principal is well secured, and the Interest only in Danger, 'tis otherwise.

* P. 392

(1)
Sid. 140. The Jury find, that the Defendants *reparare non debent*, but did not find, who ought to repair.

(2)
1 Vent. 208. Indictment for Stopping a Foot-way to the Church, *ad commune nocumentum*, good.

(3)
1 Vent. 256. 1 Mod. 112. How a Parish must plead if indicted for not repairing,

* Way.

INFORMATION against the *Hundred of Yarnton*, for not repairing a Highway, the Defendants pleaded, that *non reparare debent*, upon which they were at Issue, and though it was ill, the Court would not quash it till the Issue was tried, that it might be known who ought to repair, and upon the Trial the Jury found *quod reparare non debent*; but did not find who ought to repair, and therefore it was insisted, that no Judgment could be given. *Sed per Curiam*, the Judgment shall be, that the *Hundred of Yarnton eat acquieta*, and that the other Villis between whom the Issue was, should repair.

Indictment at the Sessions for Stopping *Communem viam pedestrem, ad Ecclesiam, ad commune nocumentum, &c.* it was objected, that an Indictment would not lie for Stopping a Foot-way to the Church, because it was only a Nuisance to the Parishioners, and no more than a Private Damage. *Sed per Curiam*, it being laid *ad commune nocumentum*, the Church may be the *Terminus ad quem, &c.* and the Way may lead further.

Where a Parish is indicted for not repairing a Way, they cannot plead Not guilty, and give in Evidence, that such a Person is bound to repair either by

Tenure

Wills.

Tenure or Prescription, because the Parish is liable *de communi jure*; but if they would discharge themselves they must plead the *Tenure or Prescription*.

Presentment in the Sessions by *one Justice*, that the Highway in *Stoke Common* was out of Repair, and that *Sir N. S.* ought to repair it *ratione tenuræ* of certain Lands, Parcel of the said Common, which he had *encroached* and inclosed from the Highway, and which Time out of Mind had been Parcel of the Highway, and that he did not repair it *ad commune nocumentum*, &c. This Presentment being removed into *B. R.* the Defendant pleaded, that the Inhabitants of *Stoke* ought to repair it, and traversed, that he ought to repair *ratione tenuræ*; and upon a Demurrer to this Plea it was objected, that it was ill, because the Defendant had not answered the *Encroachment*, which was the Principal Matter. *Sed per Curiam*, the Defendant being charged to repair *Ratione tenuræ*, that is the Chief Matter to be answered, because if he had been chargeable by Reason of the *Encroachment*, he ought not to have been charged *Ratione tenuræ*, for there is a great Difference * between the one and the other, because where there is an *Encroachment*, the Party may lay it open when he will, and then he is no longer chargeable to repair; but where the Charge is *Ratione tenuræ*, he is still bound to repair, though he lay it open to the Highway.

(4)
Sid. 464. 2 Saund. 160.
Where the Defendant was charged *ratione tenuræ*.

* P. 393

Upon an Indictment for not repairing a *Highway*, if the Defendant produce a Certificate before the Trial, that the Way is repaired, he shall be admitted to a *Fine*; but after a Verdict such Certificate will be too late, for then there must be a *Constat* to the Sheriff, and he ought to return, that the Way is repaired, because the Verdict being a *Record*, must be answered by *Record*.

(5)
Raym. 215. Upon an Indictment for not repairing, the Defendant may be admitted to a *Fine* on a Certificate, that 'tis repaired, but not after a Verdict.

Case, &c. for Stopping a Way, in which the Plaintiff declared, that he was possessed of an ancient Messuage, and had a Foot-way over the Defendant's Ground, as belonging to the said Messuage, & *de jure habet*, and that the Defendant stopped it: Upon Demurrer to this Declaration it was objected, that it was ill, because the Plaintiff did not *prescribe*, or otherwise entitle himself to this Way than only by a bare Possession of a House. *Sed per Curiam*, the Declaration is good, it being no more than a *Possessory Action*.

(6)
2 Vent. 166. Where the Plaintiff declared on his Possession, and held good.

Indictment was found against the Defendant, for that he *vi & Armis* Part of the Highway, leading from *Shoreditch to Stoke, &c. postibus & repagulis inclusit*: Upon a Trial at Bar the Chief Question was, whether the Place inclosed was an Highway or not. *Et per Hale Ch. Just.* A Way leading to any Market Town, and communicating with any great Road is a Highway; but if it lead only to a Church, or to a House or Village, or to some particular Close, 'tis a *Private Way*; and that the *Parish of Common Right* is to repair the Highway, unless particular Persons are obliged by Custom or Prescription, but private Ways are to be repaired by the *Village or Hamlet*, and sometimes by a particular Person.

(7)
1 Vent. 189. What is a Highway, and what not.

* Wills.

* P. 394

Fisher versus Nicholls. Hill. 12 Will. 3. B. R.

IN this Case it was said by *Holt Ch. Just.* That in Wills the Construction is more favourable to fulfil the Intent of the Testator, than 'tis in Deeds or other Conveyances executed by him in his Lifetime; therefore where there is a Gift by Will to *W. R.* and *his Assigns* for ever, this is an Estate in Fee; but if by Deed, 'tis no more than an Estate for Life; so if a Gift be made to *W. R.* and his Heirs Male, by Will, is an *Estate-tail*, but by a Deed, 'tis a *Fee-simple*; so a Devise to his *eldest Son* and his Heirs, after the Death of the Wife of the Testator, is an *Estate for Life to the Wife by Implication*, but 'tis not so in a Deed; the Reason of this Difference is not because the Testator is *inops Concilii*, but because a Will is not a Common Law Conveyance; but by

(1)
Wills are more favourably construed than any other Deed.

Witnesses to Wills.

the Statute, 'tis true, there were Wills before the Statute of *H. 7.* but those were not by Common Law, but by Custom, as in Case of *Burgage Lands* : Now as Custom enabled Men to dispose of their Lands in this Manner by their Wills, and not according to the Rules and Forms in Common Law Conveyances, so it exempted this Kind of Conveyance from the Regularity and Propriety requisite in those Conveyances ; and by this Means it came to pass, that Wills by the Statute in Imitation of those by Custom, gained such favourable Constructions.

By the Statute 29 *Car. 2. Cap. 3.* there is a considerable Alteration made in the Law relating to Wills in Writing ; for by that Statute it is enacted, that *the Will must be Written in the Lifetime of the Testator, and signed by him, or some other Person in his Presence, and by his Direction ; and that the Witnesses shall subscribe their Names in his Presence.*

* P. 395

* Witnesses to Wills.

Davy and Nicholas *versus* Ann Smith. Pasch. 5 Will. 3. B. R.

(1)
What shall be a sufficient
Subscribing in the Pre-
sence of the Testator.
29 *Car. 2. cap. 3.*

UPON a Trial at Bar, the Question was, whether the *Witnesses* to a Will had pursued the Directions of the Statute of * *Frauds, &c.* in subscribing their Names ; and it was resolved, that where the Testator lay in a Bed in one Room, and the Witnesses went through a small Passage into another Room, and there set their Names at a Table in the Middle of the Room, and opposite to the Door, and both that, and the Door of the Room where the Testator lay, were open, so that he might see them subscribe their Names if he would ; and though there was no positive Proof that he did see them subscribe, yet that was a sufficient Subscribing within the Meaning of the Statute, because it was possible that the Testator might see them subscribe ; and therefore, *per Curiam*, if the Witnesses subscribe their Names in the same Room where the Testator lies, though the Curtains of the Bed are drawn Close, 'tis a good Subscribing within this Statute ; because, if 'tis in his Power to see them, and what is done, it shall be construed to be in his Presence.

Lea *versus* Libb. 1 Will. 3. B. R.

(2)
Show. 68. 3 Mod. 262.
Where Two Witnesses to
a Will, and one to a Co-
dici, doth not make
Three Witnesses to that
Will.

THE Testator made his Will in Writing, subscribed by *Two Witnesses*, and devised all his Lands to *W. R.* afterwards he made a *Codicil*, in which his Will was recited ; and this also was attested by *Two Witnesses*, one of which Witnesses was a Witness to the Will, but the other was a *new Witness* ; the Question was, whether this *new Witness* should make a *Third to the Will*, the Statute requiring that there should be *Three* ; and adjudged that he should not ; 'tis true, here are three Witnesses to the Intent and Will of the Testator, but there are but Two to his *Will in Writing* ; 'tis true likewise, that there are two Witnesses to the *Codicil*, but those are not Witnesses to the written Will, so that there wants one Witness to the *Will in Writing*.

* P. 396
(3)
† 29 *Car. 2. cap. 3.*

* By the *Canon Law*, and so likewise by our Law, *Two Witnesses* are requisite to prove a Will for Goods, and *three for Lands* ; but now by the † Statute it is required, that these Witnesses *should subscribe their Names in the Presence of the Testator* ; and since the Making that Statute there have been some remarkable Cases, both as to the Manner and Number of the Witnesses subscribing.

(4)
2 Ch. Rep. 109. Where
the Witnesses subscribe at
several Times, 'tis good.

And first, as to the Manner of Subscribing : *ff.* The Case was, there were *Three Witnesses*, but they did not subscribe their Names *at the same Time*, but *severally*, at the Request of the Testator, and at *several Times*, and were not all present at one and the same Time, this was decreed a good Will.

(5)
† Antea 2.

Then, as to the *Number of Witnesses*, see the Case of † *Lea and Libb* last mentioned, and this Case : *ff.* The Testatrix made a Will in Writing, according to the

Writs, and Writs of Error, &c.

the Statute, by which she devised her Lands to *one Petit*, and afterwards by another Will she devised the same Lands to the same Person, and died, but this second Will was defective in the Circumstances of the Witnesses subscribing their Names in her Presence, which they did not, and the Will was held void for that Reason, and by Consequence no Revocation of the first Will, for that must be by a Writing by which the Testator declares his Intention to revoke the first Will.

Where the Revocation must be by a Writing operating as a Will, or declaring an Intention to revoke.

* Writs, and Writs of Error, of the Teste and Return, &c. * P. 397

Mason versus March. Trin. 11 Will. 3.

IN false Imprisonment laid to be in the Vacation, if the Defendant plead a Writ taken out *Teste in the Term, per quod* he took the Plaintiff, he (the Plaintiff) may reply, that notwithstanding the *Teste of the Writ*, he took it out in *Vacation Time*; for where the *Teste* of the *Writ* is in Support of Justice, no Averment shall be made against it: But *per Holt Ch. Just.* 'tis otherwise where 'tis to justify a Wrong.

(1)
No Averment against the Teste of a Writ, when 'tis in Support of Justice.

The Plaintiff obtained a Judgment, and after a Writ of Error brought, he, (*viz.*) the Plaintiff, brought an Action of Debt on that Judgment, the Defendant supposing it was suspended by the Writ of Error, demurred to the Declaration: *Sed per Curiam*, he can have no Advantage of this Matter upon a *Demurrer*, he ought to have pleaded it specially, and to pray Judgment if he should be compelled to answer pending the Writ of Error.

(2)
2 Vent. 261. 2 Lev. 397. Debt lies on a Judgment after a Writ of Error brought.

In a Writ of Error to reverse a Fine, *Infancy* was assigned for Error, and a *Scire facias* issued against the Tertenants and Cognisee, who plead *in nullo est Erratum: Et per Hale Ch. Just.* where Error is well assigned (as 'tis in this Case) there *in nullo Erratum* amounts to the Confession of the Fact, but where the Error is not well assigned, there *in nullo est Erratum* amounts to a Demurrer; now in the principal Case the Infancy was well assigned as an Error in Fact, therefore the Defendants ought not to have pleaded *in nullo est Erratum*, but they ought to have pleaded to Issue upon the *Scire facias*.

(3)
Raym. 231. Where Error is well assigned, there a Plea in nullo est Erratum is a Confession of the Fact.

*Resolved by the Lords Spiritual and Temporal, that Cases of Appeals and Writs of Error shall continue, and are to be proceeded on in statu quo, &c. as they stood at the Dissolution of the last Parliament, without Beginning again de novo; and * likewise, that the Dissolution of the last Parliament doth not alter the State of Impeachments brought by the Commons in that Parliament.*

(4)
Raym. 381. Appeals and Writs of Error stand good after the Parliament is dissolved.
* P. 398

Writ of Error.

Collins versus Scevington. Hill. 9 Will. 3. C. B.

THE Plaintiff obtained a Judgment for 10 *l.* the Defendant brought a Writ of Error, supposing the Judgment to be for 20 *l.* adjudged this was no *Superfedeas*, for Executions are favoured in Law as the Fruits of Men's Actions, and therefore shall not be delayed without apparent Cause, which was not in this Case, because this could not be a Writ of Error upon that Judgment.

(1)
Where a Writ of Error is no Superfedeas.

Witty versus Polehampton. Mich. 10 Will. 3. B. R.

WR. gave a Warrant of Attorney to confess a Judgment to *W. W.* as of *Trinity Term*, and afterwards to hang up that Judgment, he brought a Writ of Error, *Teste 27 June*, returnable 12 *July* following; *W. W.* the Judgment-Creditor

(2)
Where the Judgment is not suspended by the Writ of Error.

Writ of Inquiry.

Creditor having Notice of this Matter, entered up the Judgment as of the *last Day of that Trinity-Term*, so that the Writ of Error was returnable before the Judgment was signed; and upon a Complaint to the Court of this Matter, they would do nothing in it, for if it was a Trick, it was an honest one, and to obtain a just Debt: So *per Curiam*, this Judgment is not *suspended* by this Writ of Error; *aliter* if the Return had been after.

* P. 399

* *Carlton versus Mortaugh.* Hill. 2 Annæ. 2 Ld. Raym. 1005. S. C.

(3)
1 Salk. 268. Where the Plaintiff cannot have a Certiorari to certify whether any Original, or not.

WRIT of Error was brought in *B. R.* upon a Judgment in *C. B.* and the Plaintiff in Error assigned the Want of an Original for Error; the Defendant in Error pleaded a *Release* of all Errors, but laid no *Venue*, where the Release was made, for which Cause the Plaintiff demurred to the Plea, and in arguing this Demurrer it was admitted, that the Plaintiff could not pray a *Certiorari* to certify whether there was any Original or not, because the Defendant by his Plea had confessed, that there was none, the Fault being cured by the Release of Errors, and therefore it was doubted whether the Court could award a *Certiorari*, and without it they could not reverse the Judgment; for where the Plaintiff in Error assigns a good one, and the Defendant pleads an ill Bar, upon which there is a Demurrer, the Court must reverse the Judgment, because the Error is confessed and admitted. *Et per Holt*, Ch. Just. where a Release of Errors is pleaded by the Defendant, and upon Issue joined 'tis found for the Plaintiff, the Court cannot reverse the Judgment.

Writ of Inquiry.

Pagett versus Preston.

(1)
Where a Judgment shall not be set aside after a Writ of Inquiry executed.

* P. 400

CASE in which the Plaintiff declared upon an *Indebitatus Assumpsit*, and also on a *Bill of Exchange*; the Defendant *quoad the Bill of Exchange* demurred, and said nothing as to the *Indebitatus Assumpsit*, thinking thereby to make a *Discontinuance*, if the Plaintiff did not take Judgment by *nil dicit*, which he omitted, and only joined in *Demurrer*; afterwards, when the Paper-Book was made up in the Office, the Clerk of the Papers left out these Words, *quoad Billam Excambii*, and the Cause being put in the Paper, Judgment was given for the Plaintiff, * and a Writ of Inquiry was executed; and now upon a Motion to set aside this Judgment for Irregularity, by omitting these Words, *quoad Billam Excambii*, *Holt* Ch. Just. said they came too late, for they should have taken Notice of it when it came into the Paper-Office, and not stay till a Writ of Inquiry was executed; 'tis a Trick, for the Defendant concluded, that the Plaintiff would not take Notice of it on a Demurrer, being a Thing of Course; therefore the Judgment was confirmed.

East versus Estington. Mich. 1 Annæ B.R. 2 Ld. Raym. 810. S. C.

(2)
1 Salk. 130.

IN this Case it was held, that in all Superior Courts the Judge sends his Precept to the Sheriff to inquire of Damages; but in *London* and all *Inferior Courts*, an Inquest is summoned in Court, and the Court takes the Inquisition of Damages.

(3)
1 Lev. 255. Where the imperfect Finding by a Jury shall not be supplied by a Writ of Inquiry.

In Replevin, the Defendant avowed for Rent Arrear, the Plaintiff replied *Non confessit*, &c. upon which they were at Issue. and the Jury found the Value of the Cattle taken, but did not find what Rent was in Arrear, so as the Cattle might be sold to satisfy the Rent according to the Statute 17 Car. 2. and it being moved, that this might be supplied by a Writ of Inquiry, as it was in *Specott's Case*; *per Curiam*, it was so done in that Case, because the Party might have his Judgment at Common Law; but now, by this Statute 'tis enacted, *That the Value of the Rent shall be inquired by the same Jury which tries the Issue*, and therefore it cannot be supplied by a Writ of Inquiry.



F I N I S.

T H E T A B L E.

A

Abatement.

NO Advantage shall be taken of Error in a Declaration upon a Plea in Abatement, the Defendant ought to demur
Page 19
 Where a Plea is in Abatement, the Party may waive it and plead the General Issue *211*

Acceptance.

Where one may refuse to accept a Thing by Parcels *2*
 On a Distress for Rent-arrear, if the Lessee tender Part, the Lessor is not bound to accept it *ibid.*
 Where the Acceptance of Rent shall discharge the Forfeiture. *3*
 Where Acceptance of Rent will nor affirm a void Lease *4*

Acquittance.

For Rent due at *Michaelmas* last, is a Discharge of all former Arrears *298*

Action on the Case.

Where 'tis not necessary that a *Memorandum* of the Agreement should be in Writing *9, 15*
 Where it will lie on the Possession without any Property *9*
 Where it will lie before the Thing agreed on is done *95*
 Where it lies upon the first Failure of Payment, where not *6*
 Vol. III.

Where it doth not lie for negligent Keeping his Fire

It lies against one who enters on a Thing agreed on, and doth not perform it *11*

It will not lie for keeping a mad Bull, without alledging *Scienter* *12*

It will not lie for maliciously procuring one to be indicted for a Riot, unless express Malice and Damages are proved *16*

Nor for procuring one to be indicted for Barratry, after an Acquittal by *Nolle prosequi* *245*

It will not lie for hindering a Man to vote at an Election for a Member of Parliament; this was against the Opinion of the Chief Justice *17*

Action popular.

Where it lies, where not *7*

Addition.

Where an Addition after the *Alias dictus* is ill *20*

'Tis not necessary in a *Homine Replegiando* *20*

Administration.

May be granted to the Sister of the Half Blood, if unmarried, though there is a Brother in the same Degree *21*

When duly granted it cannot be repealed *21, 22*

Where *Plene Administravit* is a good Plea, where not *22*

Admiralty.

Adjudged, that Seamen lose all their Wages where a Ship is lost before she arrives at a Port of Delivery *23*

The T A B L E.

Where a Bond is triable in the Admiralty, where not Page 23 In what Cafes the Master may pawn a Ship, and in what not 24 Has no Jurisdiction, but where the whole Thing is done at Sea ibid. Advowson. Where 'tis in grofs, and where 'tis appendant 24 25, 40 Alehouse. Sessions cannot fuppress an Alehouse licensed by two Juftices, unlefs for Diforder 27 Alias dictus. Where 'tis proper, where not 238 Alien. Of his Capacity in Reference to Freeholds and to Chattels real and perfonal 28 How Lands defcend amongst Aliens 129 Where he is fued as Executor, the Trial fhall not be <i>per medietatem linguae</i> 362 Such a Trial never allowed without Prayer ibid. Amendment. Where it fhall be made in Affirmance of Judgment 30 Where the <i>Nifi prius</i> Roll fhall be amended by the Plea Roll 31 A Record of the King's Bench fhall not be amended by any of the Pleading in an inferior Court ibid. Whilst the Declaration is in Paper, the Court may give Leave to amend any Fault, but not when in Parchment, for 'tis then a Record ibid. After a Demurrer there is no amending without Leave of the Court ibid. The Court may give Leave to amend the Roll at any Time during the Term, but not after 32 Where a <i>Scire facias</i> is not amendable ibid. Amendments not allowable in criminal Cafes 38 Where the Defendant was fued by the Name of E. G. Knight, and he pleaded, that he was a Baronet, the Plaintiff could not get Leave to amend 236 Where a Variance fhall be amended, not being againft the Right 368 Amerciament. How it differs from a Fine 33	Ancient Demeſne. Where a Recovery fuffered in a Court of Ancient Demeſne is a Bar to an Eſtate-tail Page 34 Where a Fine levied in that Court is a Difcontinuance ibid. Where the Tenure is traversable, and not the Being pleadable in the Lord's Court ibid. Where a Fine levied of fuch Lands is void, and a Writ of Deceit lies by the Lord of the Manor 35 How Tenants in Ancient Demeſne came to be difcharged of Toll 36 Where in Pleading they need not fet forth their Title ibid. They may join in a Prefcription for Common 279 Appeals. In an Appeal of Murder the Fact was laid in a Pariſh where it ought to be laid in a Vill, but held good 380 What is a good Plea to an Appeal of Murder brought by the Widow 37 It lies at any Time within a Year and a Day after the Death of the deceased ibid. Formerly there was no Proceedings allowed on the Indictment till a Year after the Fact, that the Party might bring an Appeal 314 A Nonſuit after Appearance is peremptory 37 Where <i>Auterfoits</i> convict is not a good Plea in Bar to an Appeal 38 There cannot be an Amendment in an Appeal for Murder 35 Though the Parties agree, the Appellee muſt be arraigned before he can plead a Release and be difcharged 39 Appeals from Orders. An Order difcharged upon an Appeal to the Sessions is conclufive only between the contending Pariſhes; but if confirmed upon an Appeal, 'tis binding to all Pariſhes 260, 261 Muſt be to the next Sessions after the Order is made 258 Appertaining. What may be ſaid to be Appertaining, and to what, and to what not 40 Apprentice. Order to difcharge him quaſhed, becauſe made only by three Juſtices, when four are required by the Statute 41
---	--

The T A B L E.

Quashed, for that the Trade is not mentioned in the Statute 5 Eliz. Page 41
Where the Master dies, his Executor must provide for the Apprentice *ibid.*
Where the very Trade is mentioned in the Statute, it need not be averred, that it was used at that Time 42
Indictment for enticing him to absent from his Master, not good 190

Appropriation.

By whom, to whom, and how to be made 43

Arbitrement.

Where made pursuant to the Submission, and where not 44
Where a Plea is good, where not 45

Archbishop.

Hath a Power over all the Bishops of his Province, and may hold his Court any where in it 90

Archdeacon.

Where he forfeits his Right to grant the Office of Register, the King shall have it 252

Arrest

The Defendant was arrested in the Temple, the Court made him give Special Bail 45; 285
Arrest in the Night is good 46
In Westminster-Hall upon *mesne* Process, sitting the Court, the Defendant may be discharged upon Motion, but not if upon an Execution; but the Bailiff is punishable *ibid.*

Assault.

What is a good Justification in Assault, and what not *ibid.*

Assets.

An Estate for the Life of another is Assets but not distributable 137
What shall be Assets, and when, and what not 106, 107

Assignee and Assignment.

Where an Assignee is bound to repair, and to all Covenants which run with the Land 3, 4
Where the whole Term is assigned, the Assignor cannot bring an Action against the Assignee because he hath no Residuary Interest 10

Where the Assignee shall have the Advantage of all Covenants which run with the Land, but not of collateral Covenants Page 47
Where he may bring an Action of Debt upon the Privity of Contract 118

Assise.

Where the Action is good, where not 247

Assumpsit.

Not good, where brought for Money then the Defendant promised to pay 15
After a Judgment by Default, it was objected, that the Plaintiff did not set forth, that the Defendant promised, yet held good 17

Attachment.

A Foreign Attachment charges only the Debtor, or his Executor, but not the Ordinary 49
Where Money awarded to be paid may be attached *ibid.*
Where a *Procedendo* was granted after an Attachment *ibid.*

Attorney.

Where he brought an Action for his Fees, and the Defendant pleaded, that he had not given him a Bill, as required by the Statute 3 Jac. adjudged good on a Demurrer 19
This Statute doth not extend to a Special Action on the Case upon a Promise to pay the Fees 50
Where he appears without a Warrant the Judgment shall not be set aside if he is reponsible *ibid.*

Attornment.

Where 'tis not necessary to create a Privity 51
Where an Estate shall vest without any Attornment 62

Averment.

Where an Administrator brought an Action during the Absence of the Executor he must aver, that the Executor is absent 23
Where an Averment is necessary, and where not 52
Negative Pleas need be averred with *hoc paratus est verificare* 52
No Averment shall be allowed against the Teste of a Writ, where 'tis in Support of Justice; but

The T A B L E.

but 'tis otherwise where 'tis to justify a Wrong
Page 53, 397
 Where it shall not be made against a Point tried
 by the Jury 151
 It shall not be allowed either to support or defeat
 a Will 334

Avowry.

In Avowries both Plaintiff and Defendant are Ac-
tors 53
Where the Avowant shall have a Return *Habend*,
and where not; upon Tender of Costs and Da-
mages *ibid.*
Where he cannot have a Return, unless he shew a
Property *ibid.*
Avowry cannot be made by one Jointenant alone,
because it goes to the Right, but Tenants
in Common may sever in an Avowry 207
Where the Avowant need not set forth any Title
306
If for Damage feasant the Avowant must set forth
in whom the Fee is, and how the particular Estate
is derived 307
In Avowry for Rent, the Plaintiff replied, that he
was ready on the Land, and on the Day of Pay-
ment till Sun-set, &c. and concludes, *Et pe-
tit judicium, & damna*, it should be *de damnis*
344

Authority.

May be divided, but an Interest cannot 44
Where a Man hath an Authority, and not an Interest, all Acts done by him shall be taken to be done pursuant to his Authority; but when he hath both an Interest and an Authority, then it may be done by Virtue of his Interest 124

Of the Difference between an Authority and an Interest 223

B.

Bail.

P U T in upon the Removal of a Cause by *Habeas Corpus*, are not liable
Debt lies in *B. R.* upon a Recognizance of Bail
in *C. B.*
Proceedings on a Bail-Bond must stay where there
is no Return of a *Capi Corpus*
Where a Prisoner discharged on the Act of poor
Prisoners must find Special Bail, if afterwards he
is arrested at the Suit of another for above 100 l.
Where Bail is put in upon a Writ of Error, the
other Side hath twenty Days Time to accept a-
gainst them
Bail not allowed in Criminal Cases

Where it may be allowed in such Cases *Page 58*
Ca. Sa. against the Principal, and *non est inventus*
 returned, yet the Court will receive a Render in
 Favour of the Bail
 Where the Bail may plead the Death of the Prin-
 cipal *57*
 Bail in a Writ of Error cannot Render the Prin-
 cipal *57*
 After the Plaintiff hath accepted an Assignment
 of the Bail-Bond, the Sheriff shall not be a-
 merced *ibid.*
 One in Execution for Usury is notailable *58*
 Judgment against several Defendants, some sur-
 render themselves, yet the Bail are liable as to the
 Rest; but if they are taken, by the Plaintiff
 and do not surrender, then the Bail are not liable
 as to the Rest *158*
 Of *Scire Facias* against the Bail *296, 295, 320*
 Bail taken in Execution, and paying Part of the
 Money, the Plaintiff may proceed against the
 Principal for the Rest *158*

Bailiff.

A Common Bailiff is not bound to shew his Warrant, but a Special Bailiff must
Where he knows the Sheriff hath the Writ, he may
arrest the Defendant without having the Warrant
in his Possession

Bankrupt.

A Composition made by Virtue of the Statute is final 59
Sale of Goods by him after an Act of Bankruptcy is voidable by the Commissioners or Assignees, by an Action of Trover for the Goods; but if they bring an *Assumpsit*, or an Action of Debt, that affirms the Contract *ibid.*
Compositions made by the Parties signing it, binds the Rest of the Creditors 60
The Bankrupt in his Plea, reciting the Statute made it, Nonsense; adjudged not good, for he did not bring himself within the Act 60
After an Act of Bankruptcy done, but before any Commission taken out, the Sale of Goods by the Bankrupt is void 60, 61
Two Partners, one commits an Act of Bankruptcy, this shall not prejudice the Interest of the other 61

Baptism.

Custom to pay for baptizing triable at Law 86

Bargain and Sale.

Without any Consideration not good, without an
Attornment

The T A B L E.

Baron and Feme.

Where they are Defendants they must not plead *per Attornatos*, because they are but one Person in Law Page 62

Scire Facias by Husband and Wife on a Judgment obtained by her *dum sola*, and after the Execution awarded she died, the Right survives to the Husband, and not to her Administrator 63

Where she ought not to be joined in the Action with him, unless an express Promise was made to her *ibid.*

Where they Mortgage her Lands and she dies, the Husband shall redeem, and if he dies, she shall redeem, but not his Executors 64

Where he alone may have an Action of Debt upon a Bond made to her *dum sola* *ibid.*

Where she shall not be separated from him by hard Usage 139

Debt against Husband and Wife on a *Devastavit* by both, this was held ill on a Demurrer 160

Where Administration of the Goods of the Wife ought to be granted to the Husband, unless she is Executrix to another *ibid.*

Where he made her Executrix, and gave her the *Residuum* of his *moveable Goods*, and died, and then she died before Probate, Administration must be granted to the next of Kin to him; but if the whole *Residuum* had been given to her, then it must be granted to the next of Kin to her 21

Where she survives her Husband she may be charged in a *Devastavit* done by him whilst living 126

Where the Husband dies before he received her Portion, it shall go to his Executor 65

Plea to an Action of Debt on a Bond to leave his Wife so much Money if she survived, not good *ibid.*

The Father of the Wife promised the Husband so much Money when he made her a Lady, good *ibid.*

Where they must join in an Action, and where he may sue alone 105

Where a Term for Years is settled in Trust for her Jointure in Pursuance of Articles before Marriage, or where she hath a Term, and assigns it before Marriage, the Husband can never charge it 368

Bar.

Where Matter in Bar shall not be pleaded in Abatement 1

Where a Plea is not good in Bar, but good in Abatement *ibid.*

Bastard.

Must be settled in the Place where born, unless the Mother was there delivered by Fraud Page 66

Order that the reputed Father should give Security to perform it, not good 65

Bill of Exchange.

Difference between a Bill payable to the Drawee, or Order, and to him or Bearer 67

Where 'tis payable to Drawee, or Bearer, 'tis not within the Custom of Merchants, but to him, or Order, 'tis within the Custom *ibid.*

Where 'tis payable to Drawee, or Order, the last Endorsee may have an Action against any of the Endorsers 68

Bill endorsed to another for a precedent Debt due to the Endorsee, the Debt still remains if the Bill is not paid *ibid.*

The Plaintiff declared on a Custom in *London*, for the Bearer to bring the Action; if the Defendant demurs, and doth not traverse the Custom, the Plaintiff shall have Judgment *ibid.*

Infancy pleaded to an Acceptance of a Bill of Exchange 197

Protest not necessary to an inland Bill 69

Where a Bill is accepted, in such Case the Acceptor is answerable for the Whole, and an Action doth not lie against him for Part

Action doth not lie against the Endorser without endeavouring to find out the Drawer, or a Demand of the Money of him 70

Bill payable to Drawee, or Bearer, was lost, and found by a Stranger, who assigned it to another, good, but the Drawer may have Trover against the Finder 71

Bill of Exceptions.

Lies as well at a Trial at Bar as at the *Nisi prius* 155

Bishops.

The Manner of creating and translating Bishops 71

Bishopricks are still donative in *Ireland* 72

Bona notabilia.

Bills of Exchange are *Bona notabilia* where the Debtor is, and not where the Bills are, for they are no Specialty 70, 164

8 Y

Bona

The T A B L E.

Bonds.

Where two are bound jointly and severally, and one is taken in Execution, the Obligee may proceed against the other Page 6
 How the Obligee must declare on a Bond delivered after 'tis dated 73
 The Obligor was bound *in sex triginta libris*, and the Obligee declared for thirty six Pounds, and held good 74
 Where three are jointly bound, the Action must not be brought against two of them 74
 The Obligor was bound in *Quanto ginti libris*, 'tis void, because this is insensible 75
 Obligor pleads Payment of the Money, 'tis not after the Condition broken 118

Bridges.

Who are bound to repair them 77
 Indictment for not repairing a Bridge, naught, because it did not set forth what Sort of Bridge, and in what County 77
 Information for not repairing a Bridge, the Attorney-General may have a *Venire facias* from any adjacent County, or it may be from the whole County 381

Burial.

The Parson only can license to bury in the Church 86
 Registers for Burials and Baptism began *Anno* *H. 8.* 30 86
 Custom to pay Fees for Burials triable at Law 86, 287
 Less Fees must be paid where buried than where the Party died 113

By-Laws.

Powers to make By-Laws are included in the Act of Incorporation itself 76
 Where by-Laws are good, and where not 76, 78

C

Capias.

IN what Cases it lies after Judgment, both against the Principal and Bail 286

Certificate.

A poor Man coming into a Parish with a Certificate, shall not go back if he hath gained a Settlement subsequent to the Certificate. Page 252

Certiorari.

Where 'tis to remove an Indictment, both that and the *Fiat* must be signed by a Judge; if to remove an Order, then the *Fiat* alone must be signed 80
 The *Certiorari* was *de doubus equis felonice abductis*, but the Indictment removed was *de uno equo furtive abducto*, quashed for this Variance 80
 It was granted to remove both the Indictment and Conviction for a Cheat 78
 Joint Indictment against three, and another against one of those three, and another against two of the Three and a Stranger, and a *Certiorari* to remove all Indictments against the Three, quashed, because it did not set forth *vel eorum aliquem* 78
 An Order was made about foreign Salt, and the *Certiorari* was to remove an Order made about Salt generally, quashed for that Variance 79
 It lies to a County Palatine ibid.
 Return of a *Certiorari* to remove an Order quashed because it was *cujus quidem tenor*, it should have been *qui quidem ordo sequitur*, &c. 80

Challenge.

Where Three are indicted, they may join or sever in their Challenge; if they sever, they cannot be tried jointly 81
 The Jurors in a Writ of Inquiry cannot be challenged, but the Sheriff may set one aside for good Reason shewed ibid.
 Where a Challenge to the Array is not good ibid.
 Where a Challenge to the Favour is good ibid.
 Challenge for Want of Freehold, where good, where not good 80, 81

Chancellor.

Or Vicar General hath only a delegated Power 90

Chancery.

Prohibition granted to a Plaintiff in Chancery, for exhibiting a Bill upon a mere *Indebitatus Assumpsit* at Law 82
 Bonds have no Preference to Debts on simple Contract in a Court of Equity 83
 Chancery cannot interpose where Guardianship of a Child is devised 177

The T A B L E.

Church.

Parishoner is not bound to go to his own Parish-Church, so as he go to some other Church or Chapel Page 88

Where Churches are united by the Parson, Patron and Ordinary, there is but one Parson, but the Churches still remain; but where they are united by Act of Parliament, one of the Churches is extinct 89

Churchwardens.

How chosen, and though unfit, the Archdeacon cannot refuse them 90

Clerk of a Parish.

Libelled against the Churchwardens for not collecting Money due to him by Custom 87

Clerk of the Peace.

When that Office first began 250

Colour.

The Method of giving Colour 273

Commitment.

How it must be set forth in a Return of an *Habeas Corpus* 93

Common.

A Commoner cannot justify the distraining the Beasts of another Stranger on his Common, without shewing how he is damnified in it 94

Conditions of Bonds.

Are the Words of the Obligee, and shall be construed favourably for the Obligor 95, 118

Condition precedent.

Where the Words *Ita quod* make a Condition precedent, and where not 59

Where the Condition is precedent, where not 95, 108

Consideration.

Where 'tis good, and where not 96

Where 'tis not good, yet the Jury may give reasonable Damages 97

Conspiracy.

If one is acquitted the other cannot be found guilty, and yet in some Cases they may Page 97

Constable.

How chosen 98

Where he may execute a Warrant out of his Parish, where not 89

Continuance and Discontinuance.

Where a Discontinuance is helped by the Statute of *Jeofailes* after a Verdict 130

Copyhold.

Will not pass by improper Words, without a Custom so to 99

Where the Lord may grant a Copyhold after Forfeiture, and before Seizure 100

Coroner.

How chosen, and how he must make Inquisition, his Inquest is traversable ibid.

Corporation.

What it is, if by Prescription it may have several Names, is by Charter, it can have but one Name 102

Whether it can have *Gilda Mercatoria*, or not 349

They may do an Act, though not under the Common Seal, and without the Hand of the Mayor 103

What Remedy if they neglect or refuse to appear to an Action brought against them 104

Costs.

Where taxed after a Cause removed by *Certiorari*, without considering the Charges of the Court from whence removed, and yet good 104

A *Pauper* pays no Costs, unless upon a Nonsuit or Verdict against him 107

Where a Cause is removed by a Defendant, in such Case the Plaintiff may have more Costs than Damages 115

Covenant.

In what Cases it will lie 107

To save the Lessee harmless from a Rent-Charge if he pay it without Compulsion, he pays it in his own Wrong 109

Coven-

The T A B L E.

Covenant to stand seized.

Where the Words *Dedit & concessit* will amount to
a Covenant to stand seized Page 307
Of Covenants to stand seized 385

County Palatine.

Of the Privilege of Counties Palatine 110
Cannot be merely by Prescription ibid.
Courts of Counties Palatine are Original Superior
Courts 216

Customs.

Ought to have four Properties, (*viz.*) a reasonable
Commencement, to be certain, to have a Con-
tinuance, and not to be against the King's Pre-
rogative 112, 113
Of Local Customs ibid.
Where pleading Customs is good, where not ibid.
Of Grand and Petty Customs, what they are 339

Custos Rotulorum.

Who he is, and when his Office first began 250

D.

Damages.

W H E R E they are made certain by any
Statute, Costs shall be recovered as well as
Damages, but where they are incertain, Costs
shall not be had 114
Where they may be encreased, where not ibid.
Where they may be released as to one, and taken
as to another 366
There is no material Difference between Damages
and Costs, for Damages include Costs 214,
215

Damage feasant.

In Avowry for Damage feasant, the Avowant must
set forth the Fee, and how the particular Estate
is derived 307

Date.

Of a Deed either express or implied 120
Where 'tis material in Pleading 352

Dean and Chapter.

How they may make Leases, and by what Name 103
Where they are Guardians of the Spiritualities,
sede vacante 143

Death of either Party.

A Bill in Chancery was exhibited against Husband
and Wife, who put in their Answer, and then
he died, the Bill shall abate, if she will have it
so Page 84
A Contract was made for a Purchase of Lands, but
before the Conveyance was executed, the intend-
ed purchaser died; adjudged, that the Seller
is a Trustee for him 85
The Party died after the Judgment entered, but
before the Roll was brought in, and it being a
post Terminum Roll, it was not received 116
Where an Action founded on a Wrong done is
brought against four Defendants, if one dies be-
fore the Trial, the Plaintiff may proceed against
the other; but if 'tis founded on a Contract,
he cannot 117
Where the Action is abated by the Death of one of
the Defendants ibid.
Judgment in Ejectment against two Defendants,
then one dies, the Plaintiff may take Execution
against the Survivor 319
Where the Death of the Principal is pleadable by
the Bail 57

Debt.

On a Judgment pending a Writ of Error, the
Court will discharge the Defendant on Common
Bail 55
There was 100 l. due on a Goldsmith's Bill; the
Drawee owed 50 l. to *W. R.* and carried the Bill
to the Drawer, who endorsed 50 l. paid and gave
W. R. a Bill on another Goldsmith for 50 l. who
soon afterwards broke; adjudged, that *W. R.*
might Charge the first Goldsmith, for giving
Paper is no Payment where there was an Orig-
inal Debt due; 'tis otherwise where 'tis Part of
the Contract to give it 118
Where Debt will lie where there is no Privity of
Contract, as between the Grantee of the Rent
and the Lessee 303
Where it may be brought upon the Statute 32 *H.*
8. by an Executor for Rent arrear in the Life-
time of the Testator 303

Deed.

Where it must be pleaded as it operates by Law 306

Demurrer.

Of general and special Demurrers, and the Reason
of making the Statute 27 *Eliz.*

Departure.

What shall be a Departure in pleading, and what
not 123

Deputy.

The T A B L E.

Deputy. Where he may Act in his own Name, as well as in the Name of his Principal Page 124 Where a Woman may execute an Office by Deputy 2 Where a Deputation of an Office is good, where not 251 Devastavit. What shall be a <i>Devastavit</i>, what not 125 Devise. To raise Portions out of the Profits of the Estate, is a Power to sell 127 Devise of Portions to be paid to his Children at such a Time, and if any die, &c. then to remain to the rest surviving; a Maintenance cannot be decreed, because of the Devise over ibid. Disability. Where he who is to perform a Condition may be disabled, where not 96 Discontinuance. Where 'tis helped by a Verdict 131 Where and in what Actions the Court will give leave to discontinue, and where not ibid. Where the Misconclusion of a Plea will make a Discontinuance 210 Discontinuance of Estate. To whom 'tis prejudicial 131 By what Statutes 'tis remedied, and for whose Benefit ibid. Discontinuances as to Remainders and Reversions, are not remedied by any Statute 132 Diffeisin. What shall be a Diffeisin, what not 134 Distress. Lessee from Year to Year, as long as both Parties agree, was in Possession for two Years and a half, the Lessor distrained for Rent Arrear in the two Years; adjudged he could, not <i>sed quære</i> 135 Where Cattle may be distrained for Rent before they are levant and couchant, where not 136 Distribution. There shall be none amongst Collaterals after Brothers and Sisters Children, for the Estate shall go to the next of Kin of the Intestate 138	An Estate <i>pur auter Vie</i> is Affets, but yet 'tis no distributable Page 137 Divorce. For Adultery was anciently a <i>Vinculo Matrimonii</i> 138 Donative. Exempted from the Visitations of the Ordinary, and from Attendance at Visitations 140 Double Plea. Where the Plea is double, where not 142 E. Ejectment. TH E Demise was laid on the Effoin-Day, and yet good, for the Action and the Wrong done may begin on the same Day 8 Entry. Without an Expulsion makes only a Seisin, for 'tis no Diffeisin without an Expulsion 135 Escape. By one in Execution, the Creditor may retake him 159 Whether a Prisoner escaping might be retaken by an Escape-Warrant on a Sunday 148 Whether he may be retaken by such a Warrant by the Rabble, and without a proper Officer, and adjudged he could not 149 Where a Prisoner escapes, the Entry of <i>remanet in Custodia</i> in the Marshal's Book, is not a good Commencement of the Action 150 Estoppel. Where 'tis conclusive, where not 152 Evidence. Depositions taken before a Coroner may be given in Evidence upon an Indictment of Murder, if the Witnesses are dead 101 Of a Demurrer to the Evidence 122, 155 What Things must be pleaded, and what given in Evidence 252, 153, 155 An old Deed, without Witnesses, given in Evidence and held good 153
--	---

The T A B L E.

Probate of a Will given in Evidence to prove a Man Executor, held good *Pages 153, 154*
 Entry of an Order in the Office-Book, that Administration should be granted, &c. given in Evidence, and good 287
 Where, and what Copies of Things shall be given in Evidence, and what not 154
 Indictment against a Parish for not repairing a Highway, they cannot give in Evidence, that another Parish is bound to repair it; for this must be pleaded 183
 What cannot be given in Evidence upon the General Issue, and what may 155, 206, 273
 Matter of Justification cannot be given in Evidence where it cannot be pleaded 218

Exception.

What shall be an Exception out of an Exception 156

Exchange.

Of Lands, where the Word *Exchange* is necessary in the Conveyance, and where the Estates must be equal in Title, though not in Value 157, 158

Execution.

Where Goods were taken in Execution, and sold, and afterwards the Judgment was reversed, the Defendant may have Trespass if the Money is not brought into Court 214
 The Goods are bound from the Delivery of the Writ to the Sheriff 159
 Where it may be stayed upon a Motion, where not 214
 Of Executions in general 286

Executor.

Where he shall not put in Bail, and where he shall 57
 Where a Legacy is devised to him, being no Relation to the Testator, the next of Kin shall have the Residuary Estate, and not the Executor 82
 Where he shall not pay Costs 105
 Where he may distrain for Rent due to the Testator 136
 Where he may have an Action for a False Return of a *Fieri facias*, sued out by the Testator 149
 Where he may have an Action of Covenant upon a Covenant, that his Testator should quietly enjoy, but was evicted 160
 Where he hath Assets he may be compelled to redeem a Mortgage in Favour of the Heir 161

Where he may have Trespass for a Wrong done to his Testator *Page 160*
 Where the Obligee makes the Obligor Executor, 'tis a Discharge of the Debt 162, 163
 Where he dies before Probate his Executor cannot be Executor to the first Testator 164

Executor de son Tort.

Is accountable to Creditors for no more than he receives, but he is accountable to the Rightful Executor or Administrator for the Wrong done 161

Extent.

Where there must be a *Liberate* upon an Extent, and where not 159

Extortion.

Information against a Common Ferryman for Extortion 200

F.

Failure.

WH A T shall be a Failure of Record, and what not 151

Felony.

'Tis Felony to run away with Goods, tho' delivered by the Owner 194
 So 'tis to make use of the Process of the Law to a felonious Purpose *ibid.*

Fences.

Where the Cattle of a Stranger come into the Grounds of the Lessee, for want of repairing his Fences, the Lessor cannot distrain them for Rent before they are levant and couchant on the Land 136, 166
 'Tis not material, whether they were thrown down in the Night or in the Day-Time, to Charge the next Vills 167
 A Prescription, that the *Occupiers* of the next Field have Time out of Mind repaired the Fences, good, without shewing any Title in them 278

Feoffment.

How to be pleaded. 165

Fines and Amerciaments.

Belong to the King, and the Reason why 32
 Where

The T A B L E.

Where a Fine may be mitigated, and where not
 Where an Action of Debt may be brought for a Fine, without a prescription

Page 33

ibid.

Fines.

Where a Fine and Warranty is no Bar to an Estate-tail
 Where levied at Common Law upon any original Writ as well as now on a Writ of Covenant
 Levied in a County Palatine
 Where the Cognitor died after the Caption, and before the Return of the Writ of Covenant
 Levied by a Feme Covert under Age, who died before she came of Age, good

173

168

ibid.

ibid.

ibid.

Forcible Entry.

Indictment quashed, because it did not set forth what Estate the Party had
 It must be *expulit & disseisvit*, and therefore he must have some Estate of Freehold
 If an Inquisition is taken by one Justice, upon his View, he cannot deny a Traverse

169

169

170

Foreign Plea.

What is a Foreign Plea, what not
 Oath ought to be made of it in that Court, whose Jurisdiction is denied in proper Person, and fitting the Court
 Cause of Action arising beyond Sea, how and where it shall be tried

173

ibid.

381

Forgery.

Indictment for Forgery not good
 Where 'tis good, tho' incertain
 Information for Forgery compounded
 None who may be a Loser by the Deed, or have the Benefit of the Verdict, can be a Witness

171

172

ibid.

ibid.

Forfeiture.

Where the Executor of an Alienee shall not forfeit after the Acceptance of the Rent by the Lessor
 Where the Lord may grant a Copyhold after Forfeiture, and before Seizure

3

100

Fraud.

Resolutions upon the Statute of 2. Eliz. of fraudulent Conveyances

174

Fresh Pursuit.

And Retaking, where 'tis a good Plea, where not

150

G.

Gaming.

Where an *Indebitatus Assumpsit* will not lie for Money won at Play
 Covenant, that his Horse shall run four Heats, for 30*l.* each Heat, tho' these are distinct Wagers, yet the Contract is entire, and being in the Whole above 100*l.* is within the Statute

Pages 14, 175, 176

175

Gavelkind.

Before the Conquest all Lands in England were of the Tenure of Gavelkind

129

Guardian.

How many Sorts of Guardians there are
 His Duty by the Civil Law
 Infant in Custody of one who was not Guardian in Law, he was ordered to give Security not to suffer her to marry, &c.
 Where the Guardianship is devised, the Chancery cannot interpose

176

177

178

177

H.

Heir.

Where he shall be relieved in Equity against the Penalty of a Bond
 Where he shall not be disinherited upon doubtful Words in a Will
 Where his Plea of *Riens per Descent* is not good
 Debt against him, without shewing how Heir is good
 Where he shall be relieved against an Executor who hath Assets
 Where he sells Land liable to the Debt of his Ancestor before an Action brought against him, he shall answer the Value out of his own Estate
 Where his Plea of *Riens per Descent prater reversionem*, &c. is not good

84

128

157

178

179

180

ibid.

Heriot.

Surrender was made to Three successively, a Heriot is due upon the Death of each Tenant
 Heriot Service, when, and how to be paid

181

182,

332

Highway.

What shall be a Highway, and who hath a Property therein
 Who is to repair it
 Lessee

182

ibid.

Lessee

The T A B L E.

Lessee for Years cannot be charged to repair it *ratione tenuræ*, for that goes with the Inheritance P. 182
Where a Highway is turned to another Place, he he who turns it must keep it in repair *ibid.*

Hue and Cry.

Resolutions on the Statute of Hue and Cry 184

I.

Ideot.

W Here his Acts are void, and where voidable 300

Jeofails.

The Statute of Jeofails extends to inferior Courts 130

Imparlance.

Where it shall be given to another Term, and where not, in an Information brought 185
In what Cases an Imparlance is to be allowed, and in what not 186

Uncertainties.

In Indictments and Informations 39, 42, 186, 188, 199

Indictment.

For a Misdemeanor in speaking scandalous Words of King *Charles* the First 198
It will not lie for Keeping an Alehouse without License, but this was against the Opinion of the Chief Justice 27
May be found in the County where the Party died, and not where the Wound was given 39
Where the Charge must be positive; and not by Implication 39, 42, 186, 188
Where 'tis malicious, and an *Ignoramus* found, or the Indictment is erroneous, an Action lies 98
Formerly the King did not proceed on an Indictment for Felony till a Year after the Fact, that the Party might first bring an Appeal 314
Where it lies for taking Goods, tho' they were his own, if taken by Force 187
Against a Woman for Scolding, quashed *ibid.*
Quashed for not setting forth, that the Jury were *onerati* to inquire for the King and the Body of the County *ibid.*
Where it will not lie for a private Wrong 188
Quashed for Want of a Caption *ibid.*

Quashed where the Fact was not indictable P. 189
An Offence is not indictable where another Method of Punishment is appointed by any Statute 187

It will not lie for Speaking scandalous Words to a Mayor of a Corporation, unless he was in the Execution of his Office 189

The Caption was *jurat' & onerat'*, without saying *impanellat'*, good 190

For persuading a Justice of Peace not to take Bail in a Case that was bailable 191

For a Misdemeanor in buying stolen Goods, knowing them to be stole, it will not lie, because Accessary to the Felony, and he must be indicted as Accessary 192

It lies at the Sessions for writing a scandalous Letter 193

Inducement.

What shall be an Inducement to the Fact 93, 171

Inducement to a Traverse ought to contain sufficient Title 353, 357

The Inducement to a Traverse cannot be traversed *ibid.*

Where an Inducement may be without setting out a Title 355

Induction.

By a Mandate from the Archdeacon to one who doth not live in his Archdeaconry, good 195

Infant.

What Leases made by him are void, and what voidable 196

What Contracts made by him are good, and what not *ibid.*

How he must sue and be sued *ibid.*

For what he is punishable *ibid.*

He is chargeable for Money lent for Necessaries 196, 197

Where Infancy is pleadable in Abatement, it shall not be assigned for Error 197

Inferior Courts.

Where a Judgment was pleaded in an inferior Court, without any Plaint levied, and held good 212

Case lies for suing one in the inferior Court, when the Cause of Action did not arise within the Jurisdiction 216

Information.

On Penal Statutes made before the Statute 21 *Jac.* must be brought in the proper County where the Fact was done, but not upon such Penal Statutes which have been made since 199, 200
Who

The T A B L E.

Who shall be a common Informer, who not P. 200
Information for selling live Cattle, not having
kept them so many Weeks 199

Inhibition.

What it is, and the Effects of it 201
Institution or Collation by the Bishop is void, where
there is an Inhibition by the Archbishop 201

Innuendo.

Where 'tis good, and where not 225

Institution.

Without any Induction, is a Plenarty against a
Common Person 195

Intention.

Where after a Verdict such Proof shall be intended
to be made at the Trial as might support the
Action

Joinder in Action.

Where Two or more have joint Damages, they
may join in the Action
What Persons may join and be joined in Actions
202, 203
Case and Trespass, or Case and Trover may be
joined, but *Assumpsit* and Trover cannot 202,
204
What other Actions cannot be joined 203
Where Two, or more, have joint Damages, they
may join in the Action

Jointenants.

Resolutions upon Jointenancies, and Tenancies in
Common 204
Surrender of a Copyhold to the Use of his five
Children equally to be divided, and to their
Heirs, makes a Jointenancy 206
One Jointenant may distrain, but he cannot avow
alone, because that goes to the Right 207

Issue.

If Informal, 'tis aided by a Verdict 107
Cannot be joined upon two Negatives *ibid.*
Tho' the Matter is contradictory, yet there must
be an Affirmative and Negative 208
Where the Issue is immaterial, and where not 121,
208
Where Issue is joined upon an immaterial Thing,
if 'tis found for the Plaintiff he shall have Judg-
ment 305
But where 'tis taken upon an immaterial Travers,
there must be a Repleader 305

Vol. III.

'Tis Informal, if the Words *super patriam* are
omitted Page 209

Where there is an Affirmative and Negative, the
Pleading must conclude to the Country, and
not with *hoc paratus est verificare* 210

Where the General Issue is pleaded, and not entered,
the Defendant may waive it within four Days of
the Term, and plead Specially, so if he plead in
Abatement, he may waive it and plead the Spe-
cial Matter 211, 274

Where the Legality of a Warrant must not be put
in Issue 354

Where a Travers amounts to the General Issue,
'tis ill 356

Issue of the Body.

Where the Word Issue makes an Estate-Tail in a
Will, where not 128

Judgment.

Lands are bound, as to Purchasers, from the Sign-
ing the Judgment 159
Where a Judgment in an Inferior Court was plead-
ed without any Plaint levied, and held good 112
After a Rule to sign Judgment, there must be four
Days exclusive before 'tis signed *ibid.*
A Judgment cannot be affirmed in Part and rever-
sed in Part *ibid.*
Every Judgment must be both complete and for-
mal 213
Of Judgments by *Nil dicit*, and by Default, and
by Departure in despite of the Court *ibid.*
Where 'tis signed four Days after the Return of the
Postea, the fourth Day must be exclusive 213

Jurisdiction.

Cases concerning exempt Jurisdictions 79, 80
What shall be intended to be out of the Jurisdiction,
and what not 216
Where *Infra Jurisdictionem* must be alledged in
Pleading *ibid.*

Justice of Peace.

Where Property is in question the Justices of Peace
have no Jurisdiction 217

Justification.

Under a Presentment in a Court-Leet, good 52
Cannot be given in Evidence where it cannot be
pleaded 218
Where one cannot justify a Trespass unless he con-
fess it *ibid.*
Where a Justification must go to the Whole, and
where to Part 218

The T A B L E

Where 'tis repugnant Page 218
 Justification under a Judgment in a Court-Baron
 ill, because a *Levari facias* was set forth when it
 should be a *Distringas* 219

K.

King.

OF his Prerogative to pardon Offences 265
 Fines for Offences belong to him, and the
 Reason why ibid.

L.

Lancafter.

ERected into a County-Palatine by Act of Par-
 liament, *Anno 50 Ed. 3* 111
 There is one Seal for the County Palatine, and an-
 other for the Dutchy ibid.
 What Things the King may grant under the
 Dutchy Seal, and what not ibid.

Laws.

The Division of Laws 112
 Of Laws in General, and of the Common Law 222

Leafe.

From Year to Year, as long as both Parties agree,
 is a Leafe for two Years 135
 After a Year is commenced neither of the Parties
 can determine their Will 222

Leafe at Will.

The Lessee cannot determine his Will after a Quarter
 is begun, without a Quarter's Rent, nor the
 Lessor without losing a Quarter's Rent 222

Leafe for Years.

The Lessee granted the Lands to *W. R.* his Exe-
 cutors, &c. *Habendum* to him and to his Execu-
 tors after the Death of the Grantee; adjudged,
 that the whole Term passed 222

Lecturer.

The Ordinary may license him, but cannot deter-
 mine the Right to the Lecturehip 87, 144

Lect.

Justification under a Presentment in a Court-Lect;
 good Page 52

Legacy.

Is properly triable in the Spiritual Court; but when
 'tis to be paid out of the Lands, the Remedy is
 in Chancery 223
 In what Cases an Executor is not bound to pay a
 Legacy ibid.

Libel.

What shall be a Libel, and what not 224, 225,
226
 Where the Information and the Libel differ but in
 one Word, 'tis ill 224

Liberate.

Where the Sheriff may deliver a Thing extended
 without a *Liberate* directed to him, and where
 there must be a *Liberate* 159

Lights.

Where stopping Lights is a Nufance, and how to
 be abated 247

Limitation of Action.

Where the Statute of Limitations shall not be given
 in Evidence, and where it shall 154
 Where *Non Assumpsit infra sex Annos* is a good
 Plea 227
 Where the Statute is not well pleaded ibid.
 To what Cases it extends, and whether to Mariners
 Wages 227, 228
 Where a new Promise or Acknowledgment will
 revive the Action 228
 Where the Plaintiff is beyond Sea, his Case is not
 within the Statute ibid.

Livery.

Within the View an Interest passes without an
 Actual Entry 165

Lunatick.

Where he must be made a Party to a Bill in Equity,
 where not 301

The T A B L E.

M.

Maihem.

W H E R E and how the Damages shall be increased Page 114

Mandamus.

To swear two Churchwardens, the Return was, that they were not *debite electi*, but did not say, *nec eorum aliquis*, ill 162
 Denied to execute a Judgment in an Inferior Court, because the Plaintiff hath another Remedy 229
 To restore a Serjeant at Mace ibid.
 It will not lie to restore an Alderman who is poor ibid.
 Nor to restore a Proctor of Doctors Commons to his Office 230
 Nor to restore several Persons *jointly* to their Offices, but each must have a several *Mandamus* ibid.
 Denied upon a supposed Failure of Duty in the Justices of the Peace, to remove a Man from a Parish, after he had offered Security to indemnify the Parish; but if an *Affidavit* had been made of the Fact, it might have been granted ibid.
 It will not lie to turn a Fellow out of a College ibid.
 It must be directed to a Corporation by its proper Name ibid.
 Where the Return is ill, and where the Cause of Removal is good 231
 Denied to restore a Man to the Office of Clerk of the Butchers Company in *London* 232
 Denied to the New Overseers of the Poor, to make a Rate to reimburse the old ones ibid.
 To admit an Executor to the Probate of a Will; the Return was, that she was Executrix *durante minore etate* of *W. R.* who was now of full Age, not good 233, 162
 In what Cases it shall be granted, and in what denied ibid.

Manor.

By what Act it may be destroyed, and how it may be revived 25

Mariners.

Their Wages are a Duty at Common Law 227

Marriage.

What shall be good Evidence of a Promise of a single Woman to marry a single Man 16, 64
 In Personal Actions the Matter must be laid upon the Fact of Marriage, (*viz.*) that at such a Time

and Place the Parties were married; but in real Actions, and in Appeals, it must be laid upon the Right of Marriage, (*viz.*) in *legitimo matrimonio copulati* Page 64
 Custom to pay so much for marrying, is triable at Law 86
 Marriage with the Consent of such Persons, is only *in terrorem* 246

Master and Servant.

Where the Master is chargeable for the Acts of his Servant, and where not 234

Melius Inquirendum.

To whom it may be granted, but not to a Coroner 100

Misnomer.

Baronet is a Dignity, and Part of the Name 235
 Knight is likewise a Dignity, and Part of the Name 336
 Where a Corporation is misnamed 237
 The Defendant was sued by the Name of *John*, and pleaded, that he was baptized by the Name of *Benjamin*, and traversed that he was known by the Name of *John*; this Travers is repugnant 238
 Where an *Alias dictus* is proper, and where not ibid.
 Where a Demurrer to a Misnomer is not good 152, 236
 Where *John* was sued, and he pleaded, that his Name was *Thomas* 238, 239
 Where there was a Misnomer in the Surname 239

Mis-trial

What shall be a Mis-trial 192
 Where the Trial is in an improper County; as in Covenant, the Action was laid in *Kent*, and the Breach assigned was, in not repairing in *Surrey* and the Trial was in *Kent* 363
 Trial must be in that County where the Matter in Issue doth arise, and not in the County where the Action is laid 364

Money.

Of the Value of Broad-pieces of Gold and Guineas 239

Mortgage.

Where the Mortgagee lends more Money upon Bond to the Mortgagor, he shall not redeem, without paying both; but if he mortgage the Equity of Redemption to another, it shall not be affected with that Bond 84, 240

Where

The T A B L E.

Where Matter subsequent shall not make the Deed a Mortgage, if it was not so originally *Page* 241
Where a Mortgagee assigned the Mortgage, all the Interest then due; and paid by the Assignee, shall be Principal *ibid.*
Where the Heir of the Mortgagee shall have the Redemption Money where not *ibid.*

Murder.

He who gave the Stroke, and he who was assisting, are both equally guilty 39
Indictment on the Statute of Stabbing, omitting these Words *having not a Weapon then drawn* is not good 191

Mutual Promises.

Where an *Indebitatus Assumpsit* will not lie on mutual Promises 172
What shall be mutual Promises after a Verdict 14
What shall be mutual Covenants 108

N.

Nobility.

PLeaded in Abatement to the Writ 241
It cannot be surrendered or transferred by Fine, because it is a Quality inherent in the Blood 244

Nolle Prosequi.

Where 'tis no Discharge 245
When and where it may be entered as to one, and Proceedings may go on against another 247

Nonfuit.

The Difference between a Nonfuit and *Retraxit* 244

Notice.

Where it shall be intended to prevent a Forfeiture 3
Where Special Notice must be given, where not 246
Where a Devisee is bound to take of an Estate limited to him upon Condition *ibid.*

O.

Oath.

TH O' voluntary, if broken, the Party is punishable in the Court of King's Bench *P.* 248

Office.

Where it may be executed by a Woman, by Deputy 2
Where it cannot be granted in Reversion 250
Office of Marshal of *B. R.* cannot be granted for a Term of Years 251
Where Grants of Offices are void by the Statute 5 *Ed.* 6. and where not 251

Orders of Removal.

Of a poor Man quashed, because 'twas made upon Complaint only, and did not say of the Churchwardens and Overseers of the Poor 254, 255
Quashed, because 'twas not said, that he was poor or likely to be poor 255
Ought to be directed to the Officers of both Parishes, from whence, and to what Place removed 256
To remove a poor Man, and *his Family*, not good, because some of his Family might not be removable, quashed for that Reason 260
Order made by two Justices, tho' not of the Division, good 258

Overseers of the Poor.

Indicted for refusing to accompt for the Money by them received 187
Mandamus not granted to the new Overseers to make a Rate to reimburse the old ones 232

Outlary.

In *Lancaster* is pleadable in *B. R.* but Outlawry in *Chester* is not, and why 111
What is forfeited by an Outlary 262
Where Outlary is a good Plea, and where not 262, 263, 275

Oyer.

The Demand of Oyer is a Kind of Plea, and 'tis always intended, that the Deed is in Court when Oyer is demanded 119

P.

Palace.

IS not privileged where the King is totally absent, both by himself and Servants 92
O. Pardon

The T A B L E.

Pardon.

The Difference between a general and special Pardon Page 264
Upon a Pardon of Felony, the Party must find Sureties for his Good Behaviour by Recognizance; for any Time under seven Years 265

Parishes.

For what Purpose they were instituted 88

Parliament.

Debt upon the Statute 23 H. 6. for a false Return of a Member to Parliament 200
The Difference between a Prorogation and Adjournment 266
Where an Order of the House is determined by a Prorogation ibid.
Where a private Act of Parliament is misrecited, the Party must not demur but plead *Nul tiel Record*, but where a publick Statute is misrecited, he may demur 296, 330
Appeals and Writs of Error stand good after a Parliament is dissolved 397
Of Justification under an Act of Parliament 274

Partition.

Where the Judgment in Partition is not removed by a Writ of Error 145
Tenants in Common were not compellable to make Partition before the Statute 208

Pawns.

Cases relating to Pawns, where the Pawnee hath a Property in them 268
Where he may be indicted for refusing to deliver Goods on a Tender of the Money ibid.

Pension.

By Prescription, where the Party may sue for it 215

Perjury.

How 'tis punishable, and where the Offender may be indicted, where not 269, 270
Objection to an Information for a Perjury not allowed 199
No new Trial on an Indictment for Perjury 362

Physick.

What shall be a Practising Physick, what not 17
VOL. III.

Pidgeon-House.

Who may build it, who not Page 248

Pleas.

Concluding with *hoc paratus est verificare*, where good, where not 208, 209
Where there are two Affirmatives, the Conclusion must be *Et hoc paratus est verificare* 210
Where the Conclusion of a Plea makes a Discontinuance ibid.
Where there is an Affirmative to a Negative, yet if the Matter is new, the Party need not conclude to the Country 211
Pleading *inter alia* not good, because too general 271, 302
Veni & defend. Vim & injuriam, is only Matter of Form 271
Where a Plea amounts to the General Issue, 'tis not good 272
What Pleas do not amount to the General Issue 273, 274
Where a Plea in the Negative and without a full Defence, is good 282

Plene Administravit.

What shall not be given in Evidence after that Plea 151

Possession.

Without a Property will maintain an Action 9
Where the Action is founded on the Possession the Plaintiff need not set forth a Title 12
Where it will support an Action against a Wrong doer 19
Where the Avowant cannot have a Return without shewing a Property 54
Where a Man may Justify upon his Possession, without shewing a Title 220
In a *Quare Impedit* the Plaintiff must always declare upon his Possession 292
Where a Justification upon the Possession is not good 356, 361
Where the Plaintiff may declare upon his Possession for a Foot-way to his House of which he is possessed, &c. 393

Powers.

Of Powers to make Leases 276
Of Powers to sell Lands 276, 277

Prescription.

What makes a Prescription 278
In Occupiers, &c. in Farmers, &c. in Inhabitants, &c. good, and not good ibid.

The T A B L E.

Is always alledged in the Person It cannot be in Estate for Years	Page 279 <i>ibid.</i>	Of carrying a Cause to Trial by Proviso	Page 362
Presentation.		Purchase.	
Pending a <i>Quare Impedit</i>	280	The Difference where the Heir takes by Purchase and where by Descent	292
How the Plaintiff must declare upon a Presentation	<i>ibid.</i>	Where the Word Heirs is a Name of Purchase and not of Limitation	<i>ibid.</i>
Where the Incumbent is likewise Patron, his Heir and not his Executor must present after the Death of the Ancestor	<i>ibid.</i>		
Prisoners Poor.		Q.	
The Justices have no Authority to discharge them, unless they were Actually in Prison on such a Day; 'tis not sufficient that they were within the Rules	330	Quaker.	
Cannot discharge a poor Prisoner, if he owes more than 100 <i>l.</i> to any one Man	<i>ibid.</i>	W Here his solemn Affirmation shall not be al- lowed, but he must make Oath in the com- mon Form	133, 248
Privilege.		Quare Impedit.	
Of a Palace not allowed where the King is always absent	92, 284	Is a possessory Action in which the Plaintiff must always declare upon his Possession	293
After a full Defence and special Imparlance, 'tis a Question, whether the Party may plead Privilege	271	The Bishop can never counterplead the Plaintiff's Title without making a Title to himself, either as Patron or by Lapse, for otherwise he hath nothing but to grant Institution	<i>ibid.</i>
Of the Courts at <i>Westminster Hall</i> and of Officers and Attornies attending them, well pleaded, and not	283	Of the Plea of an Incumbent in a <i>Quare Impedit</i>	<i>ibid.</i>
Prohibition.			
To the Spiritual Court never too late, where that Court hath not an original Jurisdiction	87, 287	R.	
Where they have an original Jurisdiction, there a Prohibition after Sentence is too late	288	Record.	
Where it shall be granted for scurrilous Words, where not	<i>ibid.</i>	W Here an Error may be assigned contrary to the Record	2
Of the ancient Course of Proceedings on a Prohibi- tion	289	Where <i>Nul tiel Record</i> is pleaded, the Party cannot demur to such Plea	294, 330
Property.		Where upon such Plea 'tis proper to crave Oyer of the Record, unless 'tis in another Court	295
Where it doth not vest till the Actual Delivery of the Goods in Possession	62	Recovery Common	
A Man may have a Property in a Dog	140	Where it bars an Estate-tail	296
Where 'tis altered by the Seifure of Goods in Exe- cution	159	Recusant.	
Where a Man may have Property in Fish	189,	Convict made his Wife Executrix, she shall not prove his Will	133
	291	Relation.	
Where Property is in Question, the Justices of Peace have no Jurisdiction	217	Where a subsequent Act shall relate to one Prece- dent	182
Of the several Sorts of Property in Conies, Fish, and Deer, &c.	291	Where it shall be <i>ad proximum antecedens</i>	199
In Replevin, the Defendant must plead Property, either in Bar or in Abatement	307	Judgment must relate to the Effoin-Day, that being the first Day of the Term	212, 345
Proviso.			Release.
Where it makes a Covenant and not a Condition	108		

The T A B L E

Release.

Where a Release of Errors was pleaded upon a Writ of Error brought, the Judgment shall be *Nil capiat per breve* Page 214
 Release. how to be pleaded 274
 Covenant never to take Advantage of a Deed, amounts to a Release 298
 Release of all Right to such Lands will not release a Judgment not executed *ibid.*
 Release to one Obligor is a Release to both *ibid.*

Remainder.

Where it is contingent, where Executory, and not executed 128
 A contingent Remainder cannot depend upon an Estate for Years or in Fee, but it may upon an Estate for Life or in Tail 299
 Where there is no Estate to support it *ibid.*
 By what Acts the Contingency may be destroyed 300
 Where a contingent Remainder is limited, no Estate afterwards limited can vest *ibid.*

Rent.

Where Part of it became due pending an Action of Debt against an Administrator, the Plaintiff could not get Judgment 4
 Where an Action of Debt for Rent may be brought by an Assignee 118
 Debt for Rent is of as high a Nature as Debt on a Bond 161
 Where *Nil habuit in Tenementis* is a good Plea to an Action of Debt for Rent 211, 302
 What shall be a Rent and what a Sum in Grofs 302
 Where every Quarter's Rent is a several Debt, for which distinct Actions may be brought 303

Repairs.

Where the Acceptor of an Assignment must repair 3
 Where the Lessee must repair 107, 108

Repleader.

Where the Defendant is out of Court by Default there can be no Repleader 121
 Where Issue is taken upon an immaterial Traverse, there must be a Repleader 305
 'Tis not allowed after a Demurrer or Writ of Error, tho' formerly it was otherwise 305, 306

Replevin.

In Replevin the Defendant may plead Property in bar or in Abatement 307

Where the Declaration is not good, and for what Cause Page 308

Request.

Where it must be Specially alledged, and where *scipius requisit* is not sufficient 308
 Where the Request is to do a collateral Thing, and not to pay Money, there it must be averred 309
 Where there is a precedent Duty, before a Demand made, there *licet scipius requisit* is good *ibid.*

Rescous.

Where the Distress was unlawful, the Owner may rescue before the Impounding, but not after 310
 Return of a *Rescous* done to a Bailiff good *ibid.*

Resignation.

Bond to assign a Benefit upon Request, good, and no Simony 325

Restitution.

Made above three Years after the Inquisition taken of the Force, 'tis ill, because the Statute intends a Speedy Remedy 313
 Goods imported contrary to Act of Navigation were seized, and afterwards the Property was claimed by another, in such Case a Writ of Restitution is *ex gratia*, and not *ex debito Justitiæ* 313

Returns.

Of a *Mandamus* ill 88
 Where the Return of an *Habeas Corpus* is ill, for that it set forth a Custom for the Mayor, &c. to commit to the Sheriff, and doth not say, that he was Sheriff 92
 Sheriff, or other Officer, justifying under a returnable Writ, must shew, that the Writ was returned 220

Retraxit.

The Difference between a *Retraxit* and a Nonsuit 224

Reversion.

Where a Grantee of a Reversion may have an Action of Covenant against the Lessee, after the Assignment of the Term, and the Acceptance of the Rent by the Assignee 5

Revocation

The T A B L E.

Revocation.

Devise of Lands to *W. R.* in Fee, afterwards the Testator mortgaged the same Lands to *R. R.* in Fee; this is not a total Revocation of the Will, but only *quoad* the Lands in Mortgage, and the Devisee shall have the Equity of Redemption

Page 315

Where a subsequent Will shall not revoke a former

316

Where the Revocation must be in Writing, operating as a Will, or declaring an Intent to revoke

306

Where a Fine and Deed make a Revocation, where one alone would not

316

Where a Power of Revocation is once executed, 'tis final

ibid.

Riot.

An Indictment against *W. R. cum multis aliis*, is good

317

Where the Sheriff must be a Party to the Inquisition and setting the Fine

ibid

S.

Schoolmaster.

MUST be licensed by the Bishop, and may be punished in the Spiritual Court for keeping School without a Licence

318

Scire facias.

Judgment in Ejectment, and a Year and a Day passes, the Plaintiff must take out a *Scire facias* against the Defendants and Tertenants, before he can have an *Habere facias possessionem*

319

Judgment in Ejectment against two, then one of them dies, the Plaintiff may take out Execution against the Survivor

ibid.

Where the Return of a *Scire facias* is not good

320

Upon a Judgment in an Inferior Court, it must appear in the *Scire facias* how the Judgment came into *B. R.* either by *Certiorari*, or Writ of Error

ibid.

Where the *Scire facias* against the Tertenants is general, 'tis not safe for them to plead in Abatement, that there are other Tertenants, not named

321

At Common Law a *Scire facias* would not lie upon a Judgment in a personal Action

ibid.

Seats in a Church.

A Man cannot prescribe for a Seat in a Church

(viz.)

(viz.) in *navi Ecclesie* generally, without repairing it

Page 85

The Chief Seat in the Chancel belongs to the Impropriator, but by Prescription it may belong to another

86

Serjeant at Law.

Being likewise by Patent the King's Serjeant, was made Lord Commissioner of the Great Seal, his Patent of King's Serjeant is determined

252

Sessions.

Where they have no Jurisdiction but by Appeal

257

They must either reverse or affirm an Order, they cannot make a new Order on a third Parish

254

They cannot supersede an old Order

256

Settlement of the Poor.

Taxing a poor Man will not make a Settlement unless he pay it

253

The Settlement of the Husband makes a Settlement of his Wife and Children

256

But if the Parents are both dead the Children must be settled in the Place where born

257

Where the Service was for more than a Year, tho' not upon one Contract, yet it makes a Settlement

257

Where the Settlement of the Parents shall be the Settlement of the Children, where not

259

Sheriff.

No Action lies against him for taking insufficient Bail

57

Bond given to the Plaintiff himself for Appearance, and not to the Sheriff, is good

75

The subject cannot be exempted from the Office of Sheriff, but by Act of Parliament, or the King's Grant

134

Where and what Process in one Sheriff's Time may be executed by another succeeding Sheriff

147

Action against him for a False Return of a *Fieri facias*

149

Where Payment of Money to him by one taken in Execution, is good, where not

158

He must be a Party to the Inquisition for a Riot, and likewise in setting the Fine

317

Where he levies Goods by a *Fieri facias*, he may sell them, tho' he is out of his Office

322

If he does not pay the Money so levied, an Action of Debt lies against him, and against his Executor after his Death, because it was a Duty owing by him, and not only a personal Wrong

323

Where he levies more than will satisfy the Debt, he may detain it till the Debtor demands it, and where not

159

The

The T A B L E.

Tho' he may be a Trespasser, yet the Execution stands good Page 160
 Before the Statute of *Ed. 2* he never put his Name to the Return of any Writ 314
 If he return a *Cepi Corpus*, and hath not the Body, he shall be amerced ibid.

Slander.

Where Words spoken, and charging the Plaintiff with capital Offences, are actionable 325
 Where such Words are not actionable 326
 Where Words spoken of Tradesmen are actionable ibid.
 Where Words spoken of Tradesmen are not actionable 327
 Where Words spoken of Men of Professions are actionable 328
 Where such Words are not actionable ibid.

Spiritual Court.

In what Manner they may try a Thing of a Temporal Nature 288

Statute.

Where the Conclusion of Pleadings *contra formam Statuti* will hurt, where not 329, 331
 Where a general Statute is misrecited, the Defendant must demur, and not plead *Nul tiel Record*; but where a private Statute is misrecited, he must not demur 296, 330
 Where the Mistake is in the Title of the Statute, 'tis ill 331
 Where a particular Method is directed by a Statute to recover a Forfeiture either by Action of Debt or Information, an Indictment will not lie 350

Steward.

If a Manor cannot make a Deputy without special Words in his Patent so to do 124
 Wardship of a Manor may be granted in Reversion 125

Suit of Court.

1. due to Courts of publick Institution being reformed, the Defaulter shall be amerced;
 2. Service, which is due by Reservation,
 3. Lord may distrain 332

Sunday.

Where a Prisoner escaping may be retaken by an Escape Warrant on a Sunday 148
 Writ of Inquiry executed *Tres Trin.* which was on a Sunday, and it was returned as executed on Monday 346

Vol. III.

Superfedeas.

Where a Writ of Error in Parliament is no *Superfedeas* Page 333
 Where a Writ of Error in the Exchequer-Chamber is no *Superfedeas* ibid.

Surrender.

Of a Copyhold good, tho' not agreeing with the Covenant to surrender 100

Simony.

Not pardoned by the Word Offences in a General Pardon, because 'tis *malum in se* 265
 How 'tis defined ibid.
 Pending a *Quare Impedit*, one fold the perpetual Advowson to B. that he might present W. R. 'tis Simony 323
 Where the Patron was an Infant, and the Simonical Contract was made with his Mother, he need not be named in a *Quare Impedit* 324
 Where the Statute against Simony need not be recited in a *Quare Impedit* ibid.
 Where the Incumbent had no Notice of the corrupt Agreement made between W. R. and the Grantee of the next Avoidance, yet 'tis Simony 325

T.

Tail.

WHERE an Estate-tail is executed 292
 Devise to the Issue of his Body, whether it makes an Estate-tail 296
 Where a Lease made by Tenant in Tail shall bind his Issue 336
 Where a Remainder was devised to his Right Heirs Males it shall be intended Right Heirs Males of his Body 336
 Feoffment to the Use W. R. for Life, Remainder to the Son of the Feoffor and his Heirs, and for want of Issue of him, to the Right Heirs of the Feoffor, the Son hath an Estate-Tail 337
 Where an Estate-tail is executed, and where 'tis in Contingency 337, 338

Tales.

Never awarded on an Indictment, without a Warrant from the Attorney General 339
 Where a Jury is summoned to try a particular Issue, there may be a *Tales*; but in Commissions of Goal-Delivery, the Course is to send a written Precept to the Sheriff to return a Jury generally 338, 339
 Taxes.

The T A B L E.

Taxes. What Houses are taxable to the Poor, and what not, and of Taxes, Subsidies and Assessments Page 340 Tenants in Common. What makes a Tenancy in Common 205 Tenants in Common may join or sever in Debt; but they must sever in Avowry, because it goes to the Right 207 They were not compellable at Common Law to make Partition before the Statute 208 Tender. Where the Time and Place are certain, it must be set forth when he came and made the Tender, and how long he stayed 342 In Debt on Bond to pay a certain Sum on a certain Day, there a Tender on the Day, and <i>semper paratus</i> is a good Plea, but not in <i>Assumpsit</i> 343 'Tis not a good Plea where the Time and Place of Payment are certain, without alledging <i>obtulit se</i> 342 Tenor. Imports an Identity, and there must be no Variance between the Information and the Libel 225, 226 Where Debt is brought on Judgment in an inferior Court, and <i>Nul tiel Record pleaded</i>, that Court shall certify only <i>tenorem Recordi</i> 296 Time. An impossible Time is no Time 8 Where the Time is material in Pleading and not transitory 42 Where the Day is not material in Pleading 123 Where 'tis made Part of the Issue, 'tis ill 208, 209 Where a Thing is to be done at such a Time, and the Plaintiff sets forth, that it was done on such a Day, 'tis good 346 Where Time shall be computed according to the Kalendar, and not by twenty-eight Days to the Month 347 Where the Day on which a Grant was made is not traversable 355, 356 Where the Time must be traversed both before and after the Trespass 357 Where the Traverse doth not answer the Time <i>ibid.</i> Tithes. The Party may be sued in the Diocese where he subtracted the Tithes, tho' he live in another Diocese 90 Of the several Sorts of Tithes 347 Trees above twenty Years Growth are not tithable 347	The several Ways how Tithes are discharged P. 348 Tithes of Flax are small Tithes, and belong to the Vicar 349 Title. Either by Grant or Prescription need not be set forth where the Action is grounded on the Possession 12 Where a Title is set forth but inconsistent, it makes the Pleading ill 14 Where it must be set forth 274, 361 Where it need not be set forth 36, 278, 306 In Debt for Rent, the Defendant pleaded, that the Plaintiff <i>Nil habuit in Tenementis</i>, he need not set forth his Title 211, 302 Where a Man may justify upon his Possession without setting forth any Title 220 Tonnage and Poundage. When granted, and for how long 339 Trade. Indictment for using a Trade, &c. quashed, because it did not conclude <i>contra pacem</i> 190 Where an Indictment for using a Trade, not being an Apprentice to it, is not good 351 The Informer may prosecute for his Moiety of the Forfeiture within the Year, but the King may prosecute after the Year <i>ibid.</i> Traverse. Is immaterial when it makes the Issue too freight 28 It must be allowed by the Justices of Peace, if the Party tender it upon an Inquisition of a Forcible Entry on his View 170 Where 'tis repugnant, and where only Matter of Form 238 Where a Plea is not good without a Traverse 352 Where the Words <i>Virtute cuius</i> are nor traversable <i>ibid.</i> Where a Matter is confessed and avoided, it need not be traversed 353 In Avowries and Trespass, if a Freehold is pleaded, it must be traversed 354 Traverse, if pursuant to the Plea, is good 355 What is not traversable <i>ibid.</i> Treason. An Attainder in High Treason was reversed, because Judgment was given without asking the Offender what he had to say, why it should not 358 Since the Statute 25 Ed. 3. there can be no constructive Treason 358 Treason done beyond Sea may be tried in <i>Middlesex</i> <i>ibid.</i> Trespass.
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The T A B L E.

Trespafs.

Where the Declaration is good in this Action for killing Conies, and taking Fish, without saying *suos* Pages 290, 291
Trespafs *Vi Et Armis* cannot be tried in an inferior Court 359
Where Trespafs with a *Continuando* is not good *ibid.*

Trial.

Where a new Trial shall not be granted 361
In Trespafs against Three, the Plaintiff had a Verdict, but it was against Evidence as to one of them, yet no new Trial could be had 362
The Judge of an inferior Court cannot grant a new Trial after a *Scire facias* against the Bail 363

Trover.

The Declaration was general, as of *Michaelmas* Term, and the Conversion was laid on a Day certain in that Term, and yet good 9
Where this Action will lie for a Dog 139
The Conversion is the Gift of the Action 366
What Plea is good in Trover and what not *ibid.*

See Inducement.

Trust.

Where the Father and Son join in a Purchase, it shall be intended for the Advancement of the Son, and that he is not a Trustee 367
Where a Trust is to raise Money out of the yearly Profits, in such Case the Lands cannot be sold to raise the Money, unless it was to be paid on a certain Day before it could be received out of the Profits *ibid.*

V.

Vagrant.

A Man is not indictable for being a Vagrant 268

Variance.

Where 'tis amendable by the Statute 16 & 17 Car. 2. 368
Where 'tis between the Writ and the Declaration, 'tis ill 368, 370
Where 'tis between the Writ of Error and the Record certified 369
Where on a Writ of Error on a Judgment in a *Scire facias* on a Recognisance against the Bail, it was in *adjudicatione Executionis judicii*, instead of *Recognitionis*, 'tis ill 369

Where in a *Scire facias* the Copulative *Et* was put instead of *Aut*, adjudged ill Page 369

Venire facias, & Vifne.

Where a Place which is no Vill shall after a Demurrer or Verdict be intended a Vill 381
Where the want of a Venue is cured *ibid.*

Verdict.

Where it aids a bad Declaration 236
It will not help where the Matter is not actionable, or where the Party hath taken a wrong Remedy 30
Discontinuances are helped by the Statute of *Jeofails* after a Verdict 130
Where it was set aside for the Misbehaviour of a Juryman 372
Where the Defendant was charged with several Trespaffes, and found guilty as to one, and the Jury find nothing as to the other, the Verdict is ill 372
Where the Jury may give a general Verdict, and where they may find the Matter specially 373
Of Verdicts, where more is found than what was in Issue, and where less is found 374, 375

Vicar.

The Difference between a Rector and a Vicar 377
Vicarages are endowed out of the Rectory 378
Where a Vicar may sue to have his Vicarage augmented *ibid.*

Vifitation

When 'tis made by the Archbishop, all Acts of the Bishop are suspended by an Inhibition 201
The Founders and their Heirs are Visitors of Lay-Foundations 380

Univerfity.

In what Cases they have a Jurisdiction and Privilege, and in what not 383

Union.

Who may make an Union of Churches, and the Form thereof 382
Tho by an Union both Parishes are made one, yet as to Taxes and repairs, they are still several 382

Ufes.

Where Estates are conveyed by way of Use 292,
Of Considerations to raise an Use 384
Usurpaton. 385



The T A B L E.

Ufurpation. Where an Usurpation is on the King's Title, the Incumbent must get Letters Patents <i>ad corroborandum</i> Page 389 Usury. One in Execution on a Judgment for Usury, is not bailable 58 Indictment will lie at Sessions for Usury 188 The Receipt of some of the Money in Pursuance of the Usurious Contract, makes the Party punishable 390 Where <i>corrupte receptit</i> is no good Plea ibid. What shall be an Usurious Contract ibid. W. Wages. Justices have Power to make an Order for Wages, but not for Work done 261 Warrant. Of Commitment, where it must be returned <i>in hac verba</i>, where not 93 Where a good Warrant is illegally executed by an improper Officer, 'tis naught 149 Where the Legality of a Warrant shall not be put in Issue 354 Waste. If the Defendant pleads, he repaired, &c. before the Action brought, 'tis good 150 Way. Justification for a Way not well pleaded 275 The Jury found, that <i>reparare non debet</i>, but did not find who ought to repair, yet adjudged good 392 Indictment for Stopping a Foot-way to a Church <i>ad commune nocumentum</i>, good 392 Where a Parish is indicted for not repairing a Way, they cannot plead Not guilty, but must shew who is to repair either by Tenure or Prescription Page 392 Where the Defendant may be charged <i>ratione tenuræ</i> ibid. Upon an Indictment for not repairing, the Defendants may be admitted to a Fine before Verdict, upon a Certificate, that 'tis repaired 393 What shall be accounted a Highway, what not ibid. Will. Tho' Informal, may be good 127	Why to be construed favourably more than any other Conveyance Pages 127, 128, 394 What shall be a sufficient Subscribing of the Witnesses in the Presence of the Testator 395 Two Witnesses to a Will, and one new Witness to a Codicil, doth not make three Witnesses to the Will ibid. Witness. One convicted of Perjury on the Statute, tho' pardoned, cannot be a Witness 155 One who may be a Loser by the Deed, or Gainer by the Verdict, cannot be a Witness on an Indictment against another for Forgery 172 Writ of Error. Where it lies in Parliament, where not 147 Where a Writ of Error in Parliament is no <i>Superfedeas</i> 333 Nor in the Exchequer-Chamber ibid. In Debt on a Judgment after a Writ of Error brought, the Plaintiff in Error must not demur, but plead a Writ of Error depending, and pray Judgment if he shall be compelled to answer 397 Where the Error is well assigned, there the Plea <i>in nullo est Erratum</i> is a Confession of the Fact ibid. Where a Writ of Error is no <i>Superfedeas</i> 398 Where a Release of Errors is pleaded, and upon Issue joined the Plaintiff hath a Verdict, the Court cannot reverse that Judgment ibid. Where a Judgment is affirmed on a Writ of Error the Plaintiff in the Original Action shall have Damages and Costs, <i>per Statute 3 H. 7. cap. 10.</i> for the Delay of Execution 114 If the Plaintiff in a Writ of Error lie still, the Defendant shall have a <i>Scire facias</i> against him to shew why he should not have Execution on the Judgment 144 Writ of Error by the Bail, and the Error assigned was, that there was no <i>Capias</i> against the Principal, this is Error in Fact 145 Where a Writ of Error depending is no good Plea ibid. Where the Plaintiff may enter, tho' there is a Writ of Error depending ibid. Error in Fact must be redressed in <i>B. R.</i> and not in Parliament 146 Where, upon a Writ of Error brought, if the Record is not certified, the Plaintiff may have a Writ <i>de executione judicii</i> 146 Where all the Defendants in the Action must join in a Writ of Error ibid. Writ of Inquiry. Where a Judgment shall not be set aside after a Writ of Inquiry 400 Where an Imperfect Finding by the Jury shall not be supplied by a Writ of Inquiry ibid.
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F I N I S.

